



**KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM**

Complaint No. 105/2022

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

Dated 16th May, 2024

Complainants

1. K.A. Jayaprakash,
B-105, Nandini Garden,
West fort,
Thiruvananthapuram-6950233
2. K. J. Mamatha,
B-105, Nandini Garden,
West fort,
Thiruvananthapuram-6950233
[By Adv. Ranjith Kumar]

Respondents

1. M/s Gangotri Builders and Developers,
B-12, Kowdiar Gardens,
Golf Link Road, Kowdiar,
Thiruvananthapuram- 695003.



2. Mrs. Vishnumaya.P.G,
T.C. No. 9/975(11),
Panickers Lane,
Sasthamangalam.P.O.
Thiruvananthapuram 695010.

3. Mrs. Sindhu Rajmohan,
Gangotri, Nellivila,
Enikkara, Karakulam.P.O.
Thiruvananthapuram 695564.

4. Sri. S. Anilkumar,
T.C.No. 64/1097,
Ananthus Nivas,
Karumam, Nemom Village,
Trivandrum.

[R1 & R3 by Adv Praveen P]

The above Complaint came up for virtual hearing. The Counsel for the Complainant attended the hearing. The Respondents were absent.

ORDER

1. The facts of the Complaint are as follows: - The Complainant is an allottee in the project "USHAKIRAN" developed by the Respondents. The first Respondent herein is a partnership firm registered under the provision of the Indian



Partnership Act 1932 wide No. 2725/2012 with the Registrar of Firms, Kerala. The 4th Respondent herein is the absolute owner in possession of 41.74 cents of the landed property in Nemom Village, Thiruvananthapuram over which the construction is to be made. The Respondents 2 to 4 are the partners of the 1st Respondent company. The Respondents are the promoters of the project within the meaning of Section 2 (zk) under the Act, 2016. It was submitted that an agreement was executed between Respondents 1 and 4 on the said land for developing a multi-storied apartment complex by the name "USHAKIRAN" in the property of the 4th Respondent and selling the same to the interested purchasers and had executed a POA on 10-07-13 by the 4th respondent. The 2nd Respondent has obtained permission from Trivandrum Corporation to construct a multi-storied apartment complex and when the foundation work started, the Respondent offered a flat for sale to the complainants to be constructed on the 9th floor having a built-up area of 920 square feet. It is submitted that an agreement was executed between the Complainants and the Respondents based on the discussion between them, as per which the Respondents agreed to sell an undivided interest in respect of 41.740 cents of property in Nemom Village with Apartment, admeasuring to 920 Sq.ft along with car parking and share in common area. The Respondents undertook to complete the construction by the month of December 2017 and to handover possession of the building with all facilities and amenities



including car parking. It was mutually agreed that the respondents would complete constructions by the month of May 2019 and handover possession of the apartment with all facilities and amenities including car parking.

2. It is submitted that as per the agreement dt. 12-11-2016, the Complainants agreed to pay a total amount of Rs. 32,36,000/- as consideration. Out of the above amount, the Complainant paid a sum of Rs. 1,00,000/- on 20-07-2016, Rs. 1,00,000/- on 23-09-2016, Rs. 1,00,000/- on 28-10-2016, Rs. 1,50,000/- on 31-10-2016, Rs. 50,000/- on 28-12-2016, Rs. 50,000/- on 05-01-2017, Rs. 50,000/- on 25-11-16 and Rs. 36,000/- on 23-12-2019, was paid through Bank, and Rs.12,38,014/- was transferred from the loan account of the Complainant availed from HDFC. Thus, altogether the Complainant has paid an amount of Rs. 19,64,014/- to the respondents. Apart from this, the Complainants paid Rs.1,30,000/- as GST and thus a total amount of Rs.21,04,014/- was paid by the Complainants. By the time, the agreement dt. 12-11-2016 was executed, the construction activities were already commenced and the foundation works were completed. Even though the above fact was brought to the notice of the Respondents, they informed the Complainants that there was nothing to worry and that it is the general agreement executed between the Respondents and the intending purchasers.



3. Thereafter, the Complainants were bound to make the payment of further installment and the Complainants came to know that the Respondents diverted the funds collected from the Complainants and other purchasers and they could not undertake or complete the work within the stipulated time. The construction was started in the year 2015 and proceeded only up to the year 2018. Now around 6 years elapsed and the construction was abandoned by the Respondents at its various stages. Consequently, substantial damages have already been caused to the structure due to corrosion and other natural processes. It was submitted that even if the construction is completed, it will not have a life as expected because of the poor quality of the construction and the delay in carrying out appropriate activities to protect the building at different stages. Even though the Complainants and other purchasers approached the Respondents to resume the construction activity, they said that they were having no requisite money with them. Therefore, an unregistered Association was formed by the intending purchasers to persuade the Respondents to resume the construction. Even after much persuasion and requests, the Respondents resumed construction. Then also, only 40% work is completed by the respondents. As per the agreed proposal, the respondents have completed only 6 floors out of the total 13 floors including cellar and ground floor parking. Now, the building permit that was issued for 3 years has expired. No steps were taken by the Respondents to get the validity of the permit extended for



further periods. The Respondents so far have not registered the project under this Authority or opened a designated account with any Bank. From the above, it can be seen that the Respondents are not able to complete the work. The business of these Complainants is running at a huge loss. So, these Complainants are facing severe financial constraints to proceed with the project. The Complainants intend to withdraw from the project and the Complainants are entitled to realize Rs. Rs.21,04,014/- with interest @ 2% above SBI PLR. It was submitted that as per the agreement dt. 12-11-2016 executed between the Complainants and the Respondents, the Respondents agreed to complete the construction and to hand over the building for occupation by May 2019. Through the above agreement, the Respondents agreed to obtain the requisite statutory clearances like the occupancy certificate from the local authorities by December 2017 and also agreed to carry out the entire plumbing, electrical wiring, plastering, painting, fixation of fixtures etc. by the time. They failed to discharge their obligations under the agreement only for the reason that diverted the money obtained from the intending purchasers of the building agreed to be constructed on the property belonging to the 4th Respondent. If the Respondents utilized the funds collected from the intending purchasers for this project they could have very well completed the construction within the agreement time and handed over the key of the flat to the Complainants and other allottees. The Complainants agreed to purchase the building for their residential occupation.



Even after the elapse of huge period of time, the Respondents did not complete the construction nor did hand over possession of the building to the Complainant. The actions/inactions on the part of the Respondents are in clear violation of the terms and conditions of the agreement dt. 12-11-2016 entered into between the Complainants and the Respondents and also is a clear violation of the provisions contained under the Real Estate (Regulation and Development) Act 2016. As per Section 4 of the above Act, it is the bounden duty of the builder to get the ongoing project registered under the provisions of the above act. The Respondents till date have not taken any steps to get the above project registered. The Complainant has always been ready to perform his part as per the agreement at all points in time whereas the Respondents were not at all ready and willing to perform their part at any point in time. The Complainant issued a legal notice on 01-01-2020 to the Respondents. As per the agreement dt. 12-11-2016, the Respondents agreed to complete the construction and to handover the building for the occupation of the complainant on or before May 2019, there is no justification on the part of the Respondents for delaying the handing over of the possession of the building for the occupation of the Complainant. Since the construction activities were delayed solely due to negligence on the part of the Respondents, the Complainants are entitled to the compensation prescribed under section 19 (4) of the Act. At the time of negotiation between the Complainant and the Respondents which



ultimately resulted in the agreement dt. 12-11-2016 and at the time of execution of the agreement and at all times thereafter till the last payment made by the Complainant to the Respondents, the Respondents in an unequivocal term represented to the Complainant that the Respondents are having all statutory clearances and licenses to make the construction. To the surprise of the Complainant, on an inquiry made by them, it was revealed to them that no objection certificate issued by the Kerala State Pollution Control Board expired and No objection certificate from the Fire and Rescue Department of the Government of Kerala is not obtained by the Respondents. The building permit issued by the corporation has already expired and no efforts are made by the Respondents to get extension of the building permit. On the other hand, the Respondents abandoned the entire project after obtaining substantial amounts from the Complainant and others. The cause of action of the above Complaint arose on 12-11-2016 when the Complainants entered into agreements with the Respondents and on May 2019 the date on which the Respondents agreed to hand over the apartments to the Complainants. The reliefs sought by the Complainant are to (i) Issue a direction to the Respondents to apply for and obtain the requisite registration contemplated under section 4 of the Real Estate (Regulation and Development) Act 2016 as expeditiously as possible and within a time frame fixed by the Authority (ii) Allow the Complainant to recover a sum of Rs.28,31,549/- with future interest at SBI's bench mark the prime



lending rate plus 2% which comes to 15.2% per cent per annum from 14-07-08 till the date of realization of the entire amount from the respondents and their assets both movable and immovable.

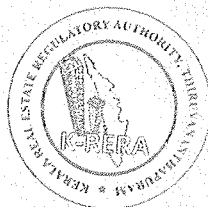
4. The above Complaint came up for hearing on 15/12/2022 along with other connected cases. The relief sought by the Complainants is for direction to register the project and for refund of payment made by them to the Respondents. Though a vakalath was filed by Adv. Praveen P for the Respondents No. 1 & 3 on 15/12/2022, he appeared only for one hearing dated 29.03.2023 and all other dates of hearings, nobody attended from the part of the Respondents despite serving even the ex parte notices to the Respondents. The 3rd Respondent and counsel sent emails requesting for adjournments stating some excuses like some festival in their nearby temple. The Authority issued ex-parte notices to all the Respondents on 02/05/2023 and the above Complaint was posted along with other connected Complaints. Despite receiving the ex- parte notices, none of the Respondents appeared or filed their reply statement to the above Complaint, so far. Hence it has been decided to pass the ex-parte order as follows:

5. The project in question is a registered project before this Authority under Section 3 of the Real Estate (Regulation & Development) Act 2016 [hereinafter referred to as the "Act 2016"] in which the proposed date of completion was shown as 30/04/2024. In consequence of the frequent directions of this

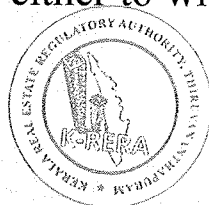


Authority during the hearings of complaints filed by other allottees of the said project, and with the financial help and the initiatives taken by the Complainant/Allottees therein, the Respondents/promoters had registered the project in question. Now, the registration has been expired on 30/04/2024, but the Respondents have not taken any steps for extension of the registration nor uploaded the Occupancy certificate or Form 6 showing that the project is completed as provided under the law.

6. In this case, the other relief sought by the Complainants is to “refund Rs. 28,31,549/- with future interest at SBI’s benchmark prime lending rate plus 2% which comes to 15.2 % p.a from 14.07.2008 till the date of realization of the entire amount from the Respondents and their assets both movable and immovable. The documents produced by the Complainant are marked as **Exhibit A1 to A6**. The **Exhibit A1** is the sale and construction agreement executed Respondent No. 1 Company represented by the Respondent No.3 with the Complainants. **Exhibit A2** is the agreement for sale of undivided share of land executed between the Complainants and the Respondent No.4. **Exhibit A3** is copy of the allotment letter dated 12/11/2016 issued by Respondent No. 1 Company. **Exhibit No. 4** is the copy of the legal notice issued by the Complainants to the Respondents. **Exhibit A5** is the statement of account and receipts of payments **Exhibit A6** is the copy of order dated 24.11.2020..



7. Section 18(1) of the Act 2016 stipulates that *“If the promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act-Provided that where the allottee does not intend to withdraw from the project, he shall be paid by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”* As per Section 19(4) of the Act 2016, *“the allottee shall be entitled to claim the refund of the amount paid with interest as such rate as may be prescribed, if the promoter fails to comply or is unable to give possession of the apartment, plot or building as the case may be, in accordance with the terms of the agreement for sale”*. It is obvious that Section 18(1) is applicable in cases where the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale duly completed by the date specified therein. Moreover, Section 18(1) of the Act clearly provides two options to the allottees viz. (1) either to withdraw from the project and seek



refund of the amount paid with interest and compensation (2) or to continue with the project and seek interest for delay till handing over of possession. Here, the Complainants had decided to withdraw from the project and demanded refund with interest.

8. As per the Exbt. A1 Agreement, executed by Respondent No. 1 Company represented by the Respondent No.3 with the Complainants, the Respondent ensured that the sale deed will be executed and the property will be handed over within 30 months from the date of the agreement dated 12/11/201, but unfortunately, even after lapse of a huge period of time, the project is not completed and the Respondents could not hand over the flat or refund the amount received from the Complainants. During the hearing of the above complaint as well as other complaints filed by the allottees of the project in question, it has come to our notice that the Respondents have completed only 6 floors out of the total 13 floors including cellar and ground floor parking. It was also noticed that the building permit which was issued by the local authority has already expired, but no steps were taken by the Respondents to get it extended. As pointed out above, the web portal of the Authority also reveals that the project in question is not yet completed. Hence, it has been established beyond doubt that the Respondents No. 1 to 3 have failed to perform their part and honour the promises given to the Complainants who trusted them and invested their hard-earned savings and as such the



Complainants herein are entitled to refund of the amount deposited by them with interest, as provided under Section 18(1) of the Act 2016. With respect to the right of the allottees for getting refund of the amount in such cases, the Hon'ble Supreme Court in its landmark judgment dated 11.11.2021 in M/S Newtech Promoters & Developers Pvt. Ltd. vs State of U P & Ors., observed as follows: *“The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act”.*

9. As mentioned above, notices were sent to the Respondents/Promoters several times directing them to appear before this Authority and an ex-parte notice dated 02/05/2023 was also sent to the Respondents/promoters, but none of them appeared or was represented by anybody. Though a counsel filed vakalath for Respondent No. 1 & 3 and appeared once and requested time for written statement, nothing has been done thereafter nor made appearance. Consequently, the Respondents were set ex-parte.



Here, the Respondents No. 2& 3 are partners of the 1st Respondent Partnership Firm/Promoter and Respondent No. 4 is the land owner of the project. According to section 69 of the Act, *“(1) Where an Offence under this Act has been committed by a company, every person who, at the time, the offence was committed was in charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section, shall render any such person liable to any punishment under this Act if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”*

10. In view of the above facts and circumstances detailed in the pre paras, it is found that the Respondents No. 1 to 3/Promoters have failed to complete and hand over possession of the apartment to the Complainants herein in accordance with the terms of the agreements and hence the Complainants in the above complaint are entitled to withdraw from the project under Section 18(1) of the Real Estate (Regulation & Development) Act 2016, and claim return of the amount paid to the Respondents 1 to 3 along

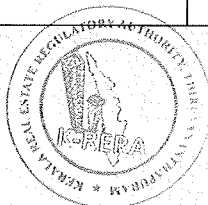


with interest from the date of payment till the date of receipt of the amount. As per Rule 18 of Kerala Real Estate (Regulation & Development) Rules 2018, the rate of interest payable by the Promoter shall be State Bank of India's Benchmark Prime Lending Rate Plus Two Percent and shall be computed as simple interest. The present SBI PLR rate is 15% with effect from 15/12/2023. Hence it is found that the Respondents No. 1 to 3 are liable to pay interest on the amounts paid @ 17 % [15%(current BPLR rate) +2%].

11. The Complainants have produced copies of Receipts of payments for Rs. **21,04,014/-** made to the Respondents which are marked as Exhibits A5 series. Details of payments made, as confirmed by the Authority based on the above documents are as detailed below:

Payment Schedule

Date	Amount(Rs)
20.07.2016	1,00,000
23.09.2016	1,00,000
04.10.2016	1,00,000
28.10.2016	1,00,000
31.10.2016	1,50,000
25.11.2016	50,000
30.11.2016	7,20,200
23.12.2016	36,000



28.12.2016	50,000
05.01.2017	50,000
29.05.2017	20,000
01.07.2017	20,000
26.07.2017	20,000
16.08.2017	30,000
02.09.2017	40,000
18.01.2018	1,29,440
24.05.2018	1,22,000
18.07.2018	1,29,440
14.11.2018	1,36,934
Total	21,04,014

On the basis of the above facts and documents placed on records and, invoking Section 37 of the Act, this Authority hereby directs as follows: -

- 1) The Respondents No 1 to 3/Promoters shall return the amount of **Rs.21,04,014/-** to the Complainant with simple interest @ 17% per annum from the date of each payment as shown in the payment schedule above, till the date of realization of the full amount.
- 2) If the Respondents fail to comply with the above direction and to pay the aforesaid sum with interest as directed above, within a period of 60 days from the date of receipt of this order, the



Complainants are at liberty to recover the aforesaid sum from the Respondent/Promoter and their assets by executing this decree in accordance with Section 40 (1) of the Real Estate (Regulation & Development) Act and Rules.

Sd/-
Preetha P Menon
Member

Sd/-
P H Kurian
Chairman

/True Copy/Forwarded By/Order/



Secretary (Legal)

APPENDIX

Exhibits produced by the Complainants

- Exhibit A1- Copy of the agreement dated 12/11/2016
- Exhibit A2- Copy of the sale agreement dated 12/05/2017.
- Exhibit A3- Copy of the allotment letter
- Exhibit A4- Copy of the legal notice.
- Exhibit A5 series- Copy of the statement of account & payment receipts.
- Exhibit A6- Copy of order dated 24.11.2020.

Exhibits produced by the Respondents

Nil

