



**KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM**

Complaint No. 133/2021

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

Dated 5th September 2023

Complainants

L Mohanan & P. Sreelatha
Flat No. 3-A, NJK Narayaneeyam Apartments,
Panampally Nagar, Ernakulam- 682036

[By Adv. Rajashekarani]

Respondents

1. P A Jinas
Managing Director
M/s Galaxy Homes Pvt. Ltd.
M G Road, Kochi- 6820358
2. M/s Galaxy Homes Pvt Ltd,
Registered Office, Rajaji Road,
Kochi- 680018

[By Adv. Thomas John]



The Counsel for the Complainants, Adv. Rajasekharan and the counsel for the Respondent, Adv. Thomas John attended the hearing.

ORDER

1. The Complainants are allottees in the project Galaxy "Cloud Space" developed by the Respondents. The Authority issued an order dated 24/06/2021 in Complaints No. 206/2020, 222/2020, 254/2020 & 46/2021 filed by the allottees of the same project in which it was directed as follows: (1) *The Respondents shall complete the works related to essential services, mutation of flats in the name of Complainants, etc. within One month and complete and hand over, the whole project 'Galaxy Cloud Space' to the Complainants, in all respects as committed/promised to them, along with all the amenities and facilities as agreed as per the agreements entered into with them and with all the mandatory sanctions / approvals required to be received from the Authorities concerned, on or before 30.12.2021 without fail.* (2) *The Association of allottees formed and registered, to monitor the progress of works and make sure that the work is being carried out as per the Work Schedule given in the Exbt. B1 affidavit marked in the above said complaints and it was informed that in case of any default on the part of the Respondent, the Association can approach the Authority seeking further*



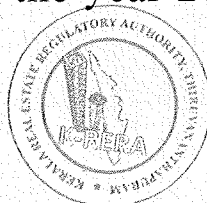
intervention. (3) The Respondents shall complete the executions of all sale deeds, if any, related to apartments / common areas of the project within the said time frame. (4) The Respondents shall handover all the documents pertaining to the project such as a) title deeds of land, b) permits/sanctions/approvals/NOCs, etc, c) all drawings of electricity, plumbing, etc. to the Association within one month from the date of receipt of the order, and (5) the Respondents shall submit before the Authority, the compliance report in the form of an affidavit on or before 03-01-2022 after serving copies to the Complainants. It was also specified that in the event of any non-compliance with the order by the Respondents, the Authority shall initiate severe penal actions as provided under Section 63 of the Act. The said Complaints were posted for further hearing separately on adjudication of interest claims filed by each one the Complainants.

2. Thereafter above complaint No. 133/21 came along with other new Complaints No. 129/2021, 203/2021, 132/2021 172/21, 243/21, 50/22, 73/22, 96/22 & 153/22 filed by some other allottees in the same project and the Authority, vide orders dated 26/07/2021 & 23/07/2022, had made the aforementioned previous order dated 24/06/2021 applicable, to these Complaints and decided to hear the claims on interest for delay on a later date. Accordingly, the interest claims on the above said Complaints



were heard together on 05/09/2023 and decided to pass orders separately in each of these Complaints.

3. The facts of the Complaint are as follows: - The Complainants had booked a proposed flat of the Respondent builder, M/s Galaxy Homes at their project, Cloud Space project near Info Park, Kakkanad and executed two agreements with Respondents on 15.05.2015 for purchase of undivided shares of land of 89.871 cents and for construction of a three-bed room flat having an extent of built-up area of 1121 sq. ft with car parking at a total cost of Rs. 39,52,411/-. On the basis of these agreements, the Complainants had availed a loan from LIC Housing Finance Ltd. Initial payment of Rs. 1,36,000 was made at the time of executing agreements. Thereafter, Complainants had been paying the instalment amounts in a prompt and regular manner till 08.09.2016. A total amount of Rs. 37,4,5752, was collected by the Respondent as on 26.06.2016. In the meanwhile, sale deed of the property was registered in the name of Complainants on 16.04.2016. As per the aforesaid agreement, the project was to be completed in all respects on or before 31.10.2016 and possession was to be handed over within 180 days provided balance amount due from the Complainants is paid. But, the progress in the construction of the flat was very disappointing from the beginning of the year 2017 which grinded to a halt



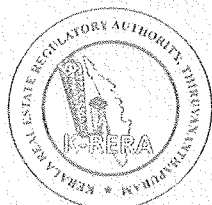
for a while and dragged in a dead slow pace. Thereafter, the builder showed totally negligent attitude towards completion and failed to complete flat within the promised and agreed time. When the builder turned totally irresponsible, the Complainants lodged a Complaint at office of the Assistant Commissioner of Police and instructed them to hand over key to the Complainants at the earliest which was also disregarded by the Respondent. Thus, a paltry balance amount of Rs. 2,06,659/- was payable to the Respondent as final payment which is kept pending by the Complainants due to these exigency situations. As the Complainants was in retirement stage, the loan from LIC Housing Finance Limited had to be pre-closed as the progress of flat completion was in doldrums and project was rated as unviable for the financier. So, all the outstanding amount of loan was recovered in lumpsum from 1st Complainants' retirement benefits, draining out his life time earnings. The Complainants have been residing in a rental building with their two daughters, studying in different higher courses.

4. The reliefs sought by the Complainants is to issue appropriate orders to the Respondent to complete the flat in all respects as per agreement and hand over to the Complainants at the earliest and Interest for delayed handing over of flat at the rate of 18%, for the total amount collected from the Complainants – Rs. 36,09,000/-,

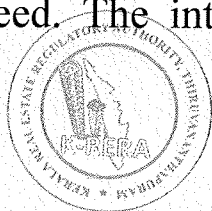


from date of proposed handing over as per agreement, i.e., 30.10.2016 + 180 days, till actual handing over. The Complainants had produced along with the Complaint, copies of the agreement for construction, Final bills, payment details. Additionally, the Complainants has produced calculation statement for interest claim and email communications showing the delay in handing over.

5. The Respondents filed statement of objection to the Complaint and submitted that the Complaint is not maintainable under law as admittedly the Complainants are claiming reliefs based on an agreement executed in 15-05-2015. The project was formulated by the Respondents in 36.39 Ares of land situated at Ernakulam with 140 apartments. The agreement for sale and agreement for construction were executed on 15-05-2015 stipulating the conditions including the payment schedule. Clause 4 of the Agreement for Construction executed between the Complainants and the Respondents on 15-05-2015 is as follows-
“The First party shall construct the apartment as per the specifications attached thereto and try the utmost possible to finish the work on or before 31.10.2016 provided the entire amount due to the First Party from the Second Party including statutory charges has been paid by the Second Party. Possession will be handed over within 180 days from the date of paying the entire consideration including statutory charges”. The date of handing



over of possession has not become due since admittedly, the Complainants have not paid the entire consideration including statutory charges as agreed by the parties and the amount as per the final bill has not been paid till date. The Respondents produced the occupancy certificate dated 27/05/2020 and 27/01/2021. The Respondents also submitted that the completion of construction is subject to the payment of entire amounts due. According to the Respondents, the project was completed in spite of the fact that the Complainants have not paid the entire amounts agreed to be paid as per the construction agreement, no cause of action for filing the above Complaint has arisen. It was further submitted that Article 20(1) of the constitution of India stipulated that no person can be prosecuted and punished for an Act which was not made an offence at the time of its commission and the reliefs sought for in the above Complaint by the applicants are in the nature of a penalty which cannot be granted in view of said constitutional protection. The penal provision as above could be invoked only for agreements executed after the commencement of the RERA Act. It was also submitted that the Act came into force in the State of Kerala vide Notification No. G.O (P) No. 65/2019/LSGD dated 05/12/2019. Therefore, the provisions of the Act are not having any application to the facts and circumstances of the case. The Respondents submitted that there was a huge delay from the part of the Complainants in remitting the instalments as well as the balance payments as agreed. The interest calculation submitted by the



Complainants is not correct. The Complainants have no right to claim interest for the amounts paid by Complainants and he is liable to pay the interest for delay in remitting instalments and the balance amount. Hence the Respondents prayed to dismiss the Complaint. The copies of Occupancy certificates and the final are produced by the Respondents.

6. 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 is shown as 04/06/2022. On perusal of the web page concerned, the Respondents have uploaded the occupancy certificate and the final fire NOC obtained for the project in question but the Respondents have neither uploaded Form-6 showing completion of the project nor taken any steps for extension of registration as provided under the provisions of the Act 2016 despite notice from the Authority.

7. Heard both parties of the above complaint in detail. The documents produced from the part of the Complainants are marked as Exbts.A1 to A5. The documents produced from the part of the Respondents are marked as Exbts.B1& B2. After hearing the counsels on either side and perusing the pleadings and documents submitted by both parties with respect to the claim of the Complainants for interest for delay, the following points are being considered and decided herewith:



- 1) Whether the Respondents/Promoters failed to complete or were unable to hand over possession of the apartment to the Complainants, in accordance with the terms of the agreement or duly completed by the date specified therein or not?
- 2) Whether the Complainants herein are entitled to get interest for delay in completion and handing over possession of the apartment as provided under Section 18(1) of the Act, 2016 or not?

8. **Points No. 1&2:** The documents produced by the Complainants are marked as Exhibits A1 to A5. **Exhibit A1** is the construction agreement dated 15-05-2015 executed between the Complainants and the Promoter company represented by its Respondent for constructing a three-bedroom apartment having a built-up area of 1121 sq. ft on the sixth Floor in the said project for a construction cost of Rs. 38,15,659/- in which the promised date of completion is shown as 31/10/2016 with 180 days grace period. **Exhibit A2** is the final bill. **Exhibit A3** is the mail communication showing the status of the work. **Exhibit A4** is the payment schedule, **Exhibit A5** is the calculation statement. The documents produced by the Respondents were marked as Exhibits B1 to B2.



Exhibit B1(a) is the copy of the Occupancy Certificate dated 27/05/2020 and the **Exhibit. B1(b)** is the copy of Occupancy Certificate dated 27/01/2021. The final bill has been produced by the Respondents which is marked as **Exhibit B2**.

9. As mentioned above, the other reliefs sought in the above complaint have already been adjudicated and the order has been passed, the only prayer to be considered herewith is for the direction to pay interest for delay in completion and handing over the apartment allotted to the Complainants. According to Section 18(1) of the Real Estate (Regulation & Development) Act 2016 [hereinafter referred to as “the Act, 2016”], “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.” It is obvious that Section 18(1) of the Act,



2016 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, 2016 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 has opted to continue with the project and claimed interest for delay in handing over possession of the apartment to him.

10. Here, as per the Exbt. A1 agreement, Clause No. 4 is as follows: *“The First party shall construct the apartment as per the specifications attached hereto and try the utmost possible to finish the work on or before the 31st day of October, 2016 provided the entire amount due to the First Party from the Second Party including statutory charges has been paid by the Second Party. Possession will be handed over within 180 days from the date of paying the entire consideration including statutory charges.”* Exhibit. A1 agreement is seen executed by the Complainants and the Promoter Company represented by its Respondent/Managing Director on 15-05-2015 as per which the promised date of completion and handing over was 31/10/2016 with a grace period of 180 days. According to the learned counsel



appeared for the Complainants, the Respondents have not handed over possession of the apartment so far to the Complainants. It is admitted by the Respondents that the Occupancy Certificate has been obtained for the project only on 27-01-2021. It feels strange that the learned counsel for the Respondents/Promoter produced copies of 2 Occupancy certificates for the same project dated 27-05-2020 and 27-01-2021 and on examination of the said certificates issued by the local authority, it could be seen that the one issued later on 27-01-2021 is the final Occupancy Certificate for the building. In fact, the earlier one dated 27/05/2020 was a partial occupancy certificate for certain area issued on demand of the Promoter, the Secretary of the said local authority/Thrikkakkara Municipality signed on it ought to have shown specifically that it was only a “partial occupancy certificate.” Surprisingly, both of these certificates bear the same heading “Occupancy Certificate” and both certify that “..... *inspected by me and the work executed is in accordance with the permit and the building is now fit for occupation/use.*” However, this Authority made it clarified time and again that as per the Scheme of the law, what the provisions concerned of the Act 2016 and Rules 2018 made thereunder envisioned was not a partial or conditional Occupancy Certificate, but it was the final Occupancy Certificate, issued by the Competent Authority, certifying the completion of the project in all respects. As pointed out by several orders of this Authority, even the so-called “final Occupancy



Certificates” issued by the local authorities now in accordance with the prevailing Building Rules in the State do not constitute the completion of the whole project as promised to the allottees as per the terms of the agreements executed with them by the Promoter instead these can only be considered only as proof of completion of the building/s concerned in accordance with the approval plan. The Respondents/Promoters, being well aware of these facts, are supposed to be more careful before submitting such misleading contentions and documents before this Authority.

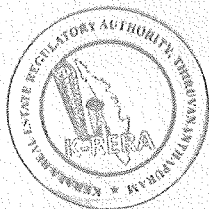
11. Regarding the issue of maintainability raised by the Respondents/Promoters, it is pertinent to note that the projects that are not completed and have not received the Occupancy Certificate on the date of commencement of the Act come under the fold of the Real Estate (Regulation & Development) Act 2016 and in this case, it is evident that the project has not completed till date, as promised to the Complainants. In the judgement passed in *M/s New Tech Promoters & Developers Pvt Ltd. Vs State of U P & Others*, the Hon’ble Supreme Court of India confirmed that the Act 2016 is “retroactive” in nature and made observations in this regard as follows:

“the clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation rule of statutory construction, only one result is possible, i.e., the



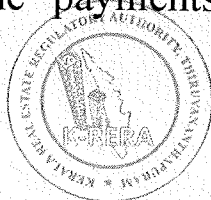
legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an ongoing project. Thus, it negates the contention of the promoters regarding the contractual terms having an overriding effect over the retrospective applicability of the Act, even on facts of this case”.

12. Even though we had clarified many times through our previous orders, the counsel for the Respondents has been continuously raising the very same contention in all the reply statements that ‘the relief sought for by the Complainants cannot be granted in view of the constitutional protection given as per Article 20 of the Indian Constitution’. We would clarify it again that according to Article 20(1) *“No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence”* which means that if an act is not an offence at the date of

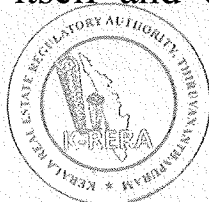


commission, it cannot be an offence at the date subsequent to its commission. Even before the induction of the Act 2016, the Promoters were not having any right to violate the terms of the agreement executed with the homebuyers and cheat them after grabbing their hard-earned savings. Above all, it is to be noted that Article 20(1) provides constitutional protection to individuals charged against criminal offences prohibited by law but in case of civil liberties or civil proceedings, Art 20(1) shall not be applicable which was made clear by the Hon'ble Apex Court through a lot of judgements. Anyhow, during the final hearing, the Respondent has not pressed on the issue of maintainability as raised through his pleadings.

13. Here, the learned counsel for the Respondents mainly raised arguments that the completion date was subject to the performance on the part of the Complainants but the Complainants failed to perform by making delay in the payments as per the agreement and hence delay in the progress of works will not constitute a breach on the part of the promoter. He also argued that a person raising the claim of breach of contract should have come with clean hands, by performing his part of the agreement, but the Complainants herein had violated the terms of the agreement when he failed to pay monthly instalments. Anyhow, on examination of Exhibit A4, it reveals that the Complainants had made most of the payments before the handing over date.



With regard to the contentions raised by the Counsel for the Respondent/Promoter that there was failure from the part of the Complainants in paying instalments on time, no documents/communications produced from the side of the Respondents to substantiate this contention because the Respondents could have sent notice of cancellation of booking to the Complainants at the time of the alleged delay in making payments, by invoking provisions under Section 19(5) and (6) of the Act, 2016 and under Clause 9.3 of 'Annexure 'A' Agreement for sale' under Rule 10 of the Kerala Real Estate (Regulation and Development) Rules, 2018. Here, Exhibit B1/ occupancy certificate dated 27-01-2021 reveals that the construction according to the approved plan was completed only on 27-05-2020. Exbt A3 email communication also reveal that the Respondents could not complete and hand over the apartment on time as promised as per the agreement. In view of this, the Respondents have no right to blame the Complainants for any delay/irregularity in payments. Here, the promised date of completion and handing over was 31/10/2016. But possession of the apartment is not yet handed over according to the Complainants. It can be seen that the delay in final payments occurred due to the non-completion of work as promised by the Respondent/Promoter. As the Complainants had availed loan from a financial institution, the payments have been done through the said institution itself and obviously if there is no satisfactory



progress in the works, such institutions will not disburse installments. As stated above, Exhibit B1 occupancy certificate shows that the Respondents could not complete the project as promised and apart from that, the registration web page of the project in question reveals that the Project is not completed even now as the Respondent/Promoter has not yet uploaded Form-6 Certificate showing completion of the project.

14. Under Section 11(4) of the Act, 2016, the Respondent/Promoter is responsible to obtain the occupancy certificate, from the Competent Authorities and under Section 17 of the Act, 2016 after which, he is duty bound to hand over physical possession to the allottees. Section 17 of the Act, 2016 stipulates that *“conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate. After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to hand- over the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws: Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as*



the case may be, within thirty days after obtaining the occupancy certificate". It was observed by the Hon'ble Supreme Court in its judgement Wg. Cdr. Arifur Rahman Khan & others vs Dlf Southern Homes Pvt. Ltd., as follows:

"Judicial notice ought to be taken of the fact that a flat purchaser who is left in the lurch as a result of the failure of the developer to provide possession within the contractually stipulated date suffers consequences in terms of agony and hardship, not the least of which is financial in nature. The amount of interest represents compensation to the beneficiaries who are deprived of the use of the investment which has been made and will take into its ambit the consequence of a delay in not handing over possession." Even if the Complainants/allottee had made delay in any payment of instalments, the Promoter has undoubtedly made use of the investments of the Complainants' hard-earned money for the past years and failed to complete the work and hand over possession as per the terms of the agreement.

15. It is obvious that Section 18(1) of the Act, 2016 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. As per Exbt.A1 the Respondents should have handed over possession of the apartment on 31/10/2016, and the Complainants could take over possession



within the grace period. Since the Respondents could not hand over possession as per the terms of the agreement, the Complainants is eligible to get interest for every month of delay as per the proviso to Section 18(1) of the Act, 2016. Proviso to sec 18(1) provides 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.” It will not be out of place to mention here, certain remarkable observations made in this regard by the Hon’ble Supreme Court of India in its Judgement dated 11/11/2021 of *M/s Newtech Promoters and Developers Pvt. Ltd Vs State of UP & Others* as follows:

“ 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/homebuyer, 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 with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed”.



16. In view of the facts and findings discussed in the foregoing paragraphs, it has been revealed beyond doubt that the Respondent/Promoter has failed to complete and hand over possession of the apartment as promised to the Complainants herein and hence the Complainants are entitled to get interest for delay in handing over possession as provided under Section 18(1) of the Act 2016. Points No. 1 & 2 are answered accordingly in favour of the Complainants.

17. In the instant case, the Complainants had remitted **Rs. 36,09,000/-** to the Respondents and the Complainants pray for interest for the delayed months. According to the complaint, the Complainants have paid an amount of Rs. **36,09,000/-** fully before the promised date of completion, i.e., on 31/10/2016. As the Respondent/ Promoter is a defaulter, he is not entitled to get the benefit of the grace period mentioned in the Exhibit A1 agreement. The respective dates of payments and amounts in total are as follows:

Date	Amount in Rs.
02/02/2015	25,000/-
10/02/2015	1,00,000/-
07/03/2015	56,000/-
07/03/2015	44,000/-
10/04/2015	5,00,000/-



14/05/2015	64,000/-
13/07/2015	1,88,000/-
22/09/2015	2,25,000/-
26/11/2015	5,27,000/-
18/02/2016	1,88,000/-
29/06/2016	15,04,000/-
08/09/2016	1,88,000/-
Total	36,09,000/-

18. As the Complainants are found entitled to get interest for the delayed handing over of possession, the Respondents are liable to pay interest to the Complainants as per the proviso to Section 18(1) of the Act, 2016. Hence the Complainants are entitled to get interest for the period from 1/11/2016, the promised date for handing over till the actual date of handing over possession, on Rs. **36,09,000/-** which is the amount paid by him before the promised date of completion. 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 14.85% with effect from 15/03/2023. Hence, it is found that the Respondents are liable to pay interest on the



amounts paid as mentioned above @ 16.85 % [14.85 (current BPLR rate) +2%].

19. On the basis of the facts and circumstances of the case, as detailed above and by invoking Section 37 of the Real Estate (Regulation & Development) Act, 2016, the Respondents are hereby directed as follows:

1) The Respondents shall pay to the Complainants, simple interest @ 16.85% per annum, for Rs. 36,09,000/-, the amount paid by the Complainants, for every month from 01/11/2016 till the actual date of handing over possession.

2) If the Respondents fail to pay the aforesaid amount of 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 amount from the above Respondents and their assets by executing this decree in accordance with the Real Estate (Regulation & Development) Act and Rules.

Sd/-
Smt. Preetha P Menon
Member

Sd/-
Sri. P H Kurian
Chairman

/True Copy/Forwarded By/Order/



Secretary (Legal)

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

- Exhibit A1 : Copy of Agreement for Construction
Exhibit A2 : Final Bill
Exhibit A3 : email communications
Exhibit A4 : payment schedule.
Exxhibit A5 : Interest Claim

Exhibits on the side of the Respondents

- Exhibit B1 : True Copy of Occupancy Certificates
issued by Thrikkakara Municipality
Exhibit B2 : Final Bills

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