



KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint No. 143/2022

Dated 29th November, 2022

Present: Smt. Preetha P Menon, Member

Complainant

Suresh Kumar. P.R
Puthusseril House, Poovaranny P.O
Pala, Kottayam- 685577

Respondents

1. M/s. Galaxy Homes Pvt. Ltd
Galaxy Square, Rajaji Rd.Jn.
M.G Road, Ernakulam- 682035
2. P.A Jinas,
Managing Director,
Galaxy Homes Pvt Ltd
Galaxy Square, Rajaji Rd.Jn.
M.G Road, Ernakulam- 682035

The above Complaint came up for virtual hearing today. The Counsel for the Complainant B. Rajasekharan Nair & Counsel for the Respondents Adv. Thomas John. P. attended the virtual hearing.



ORDER

1. The Complainant is an Allottee of the project named 'Galaxy Carlton' vide Reg. No: K-RERA/PRJ/130/2021 located at Kadavanthara, Ernakulam District which is being developed by the Respondents. The Complainant had booked a flat in the said project and executed two agreements dated 05/08/2014 with the Respondents ie., an agreement for sale of undivided share for a consideration of Rs.5,21,184/- and an agreement for construction of a 3BHK Flat No. A-1 at a cost of Rs.30,76,628/-. On the basis of the above agreements the Complainant had been paying the instalment amounts to the Respondents in a regular manner as per the schedule in the agreements and as on 19/06/2015, the Complainant paid a total amount of Rs.11,75,000/-. The Complainant further submitted that as per the construction agreement, the project was to be completed in all respects on or before 31/08/2016. But the progress in the construction of the flat was very disappointing from the beginning which dragged in a dead pace. Despite collecting payments from the Complainant and pressurising him with notices for advance payments, work was trailing and at times remained held up for long which was in violation of the terms of the agreement. Thus, the Complainant realised that the Respondent is not in a position to honour the terms of the agreement rather deviating the funds collected for this project to other projects in an unethical manner. Accordingly, the Complainant



had to take a hard decision to withdraw from the project. So, he submitted his request to the Respondent for cancellation of booking and refund of the amount collected vide letter dated 03/06/2016. There after the Complainant made all efforts to get a favourable response from the Respondents, but miserably failed. It was after prolonged and strenuous efforts that the Respondents furnished a reply for the cancellation request, vide letter dated 25/08/2019, after more than 3 years. Later the project was partially completed by the intervention of Allotees Association in 2020, which is still incomplete. Hence this complaint. Copies of agreement for sale, agreement for construction, copy of cancellation request, copy of reply submitted by the Respondent are the documents produced from the part of the Complainants. The Reliefs sought by the Complainant is refund of an amount of Rs.11,75,000/- which is collected by the Respondent along with interest as applicable from 19/06/2015 till the date of realisation.

2. The Respondents have filed objection stating that the above Complaint is not maintainable before the Authority and the said project was launched for catering to the housing needs of customers at very affordable rates. The Complainant had agreed to purchase an apartment on the 1st Floor of the said project having super built up area of 968 sq.ft. and an agreement dated 05/08/2014 was also executed. As per the said agreement, the Complainant agreed to pay the purchase price of the building in periodical



instalments specified in the agreement. As per clause 5 of the construction agreement dated 05/08/2014 "the Respondents shall construct the apartment and try the utmost possible to finish the work on or before 31/08/2016 provided the entire amount due to the Respondent from the Complainant including statutory charges has been paid by the Complainant. Possession will be handed over within 180 days from the date of paying the entire consideration including statutory charges". Therefore, the Respondents are bound to complete the construction only in the event of the Complainant paying the money in periodical instalments as agreed in the agreement, but the Complainant did not pay the amount as agreed. The Respondent further submitted that at the time of executing the construction agreement, the Complainant paid a sum of Rs.5000/- only, as advance out of the total amount of Rs.30,26,628/- payable in terms of the above agreement towards the construction cost. The Complainant had committed defaults in paying the monthly instalments payable in terms of the agreement from the very outset onwards. Out of the first instalment of Rs.5,16,000/- payable as on 15/09/2014, the Complainant had paid only a sum of Rs.2,50,000/- on 21/02/2015. Thereafter a further amount of Rs.4,00,000/- was paid on 19/06/2015, and thereafter the Complainant did not pay any amount. Since the Complainant committed defaults in paying the amount agreed to be paid in terms of the agreement, the Complainant is not entitled to get any relief. The Respondents issued repeated letters and reminders on various dates and thereby requested the



Complainant to pay the amounts in terms of the construction agreement. Because of the refusal of the Complainant in paying the money untold miseries and hardships are caused to the Respondents as the Respondents fell in paucity of money to proceed with the construction. Thereafter, on 01/09/2015 a letter was issued by the 2nd Respondent to the Complainant to execute the revised agreement for which the Complainant did not respond. The Complainant has issued a letter to the Respondents on 03/06/2016, asking the Respondents to cancel the agreement and to refund the amount paid by him. Responding to the above letter, the representatives of 1st Respondent contacted the Complainant and informed him that the amount could be refunded only in compliance of clause 19 of the construction agreement which says that 'in the event of purchaser is unwilling to purchase the apartment the amount will be refunded after deducting a liquidated damage equivalent to 10% of the amount paid'. The Construction of the apartment of the Complainant got delayed solely for the reasons attributable to the Complainant alone and not because of any delay on the part of the Respondents. The amount agreed to be paid by the Complainant as per the agreement is for meeting the construction cost of the building. Because of the failure on the part of the Complainant in paying the amount, the Respondents found it very difficult to proceed with the construction. The Respondents had to find out money from other sources for proceeding with the construction and because of delay in payment of the agreed amount, the Respondents sustained heavy loss because of escalation of labour



cost and cost of materials. Therefore, the Complainant is not entitled to get full refund of the amount paid by him. The Respondents submits that the Complainant had approached the Hon'ble Commercial Court, Ernakulam by filing a civil suit as C S No.214/2021 seeking the same relief and the same is abandoned by the Complainant and therefore, the above Complaint is not maintainable. The complaint is barred by limitation also. The agreement was cancelled before the Act 2016 coming into force and hence the provisions of the Act 2016 are not applicable in the case of the Complainant and the dispute herein does not come under the jurisdiction of the Authority. The Occupancy Certificate for the project was issued on 07/10/2020 by the Kochi Municipal Corporation and the other purchasers are already put in occupation of the building. Therefore, the complaint be dismissed with costs of the Respondents. The Copies of various notices and occupancy certificate are produced from the part of the Respondents.

3. The Complainant has filed reply to the objection filed by the Respondents and submitted that out of the total cost of Rs.35.98 Lakhs, the Complainant paid Rs.11,75,000/- before July 2015, towards booking amount, agreement amount and subsequent instalments as per the schedule. A bank loan was arranged by the Complainant and relevant documents such as loan sanction letter, conditions, schedule, stage by stage progress for release of amounts etc. were submitted to the Respondents and the same was accepted



by them. So, the balance amount was to be paid from bank as per progress in work monitored and stipulated by bank. When the last payment of Rs.4,00,000/- was paid on 19/06/2015. But the progress in the work was zero except some ground clearance. Photographs dated 25/07/2015 was also produced to substantiate the same. But the Respondents kept pestering the Complainant for more payments, which they were diverting elsewhere and tried to extract more money from the Complainant. As the work was not progressing as per the agreement the Complainant realised that the Respondents were intentionally delaying the project and not in a position to complete the construction as per the agreement i.e., on 31/08/2016. Hence the Complainant was constrained to withdraw from the project and demanded refund of the amount paid vide letter dated 03/06/2016. But there was no written reply for the request for refund from the Respondents for more than 3 years till the Complainant get a belated reply dated 28/08/2019, quoting arbitrary conditions. As regards other objections raised by the Respondents, limitation clause does not apply when RERA Act came into force and prevailed upon. Even though the Respondents have obtained occupancy certificate for the project on 2020, still the amenities are incomplete and the claim of the Respondents are baseless.

4. I 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:

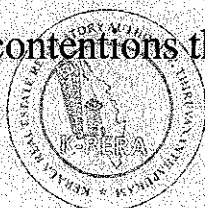
1) Whether the Complaint is maintainable before this Authority?

2) Whether the Respondents/Promoters failed to complete or were unable to hand over possession of the apartment to the Complainant, in accordance with the terms of the agreement for sale, duly completed by the date specified therein or not?

3) Whether the Complainant herein is entitled to withdraw from the project and claim a refund of the amount paid with interest as provided under Section 18 (1) of the Act 2016 or not?

3) What order as to costs?

5. **Point No. 1:** The project named ' Galaxy Carlton' is found registered before the Authority under section 3 of the Act 2016, vide registration No. K-RERA/PRJ/130/2021. Exbt.B5, the copy of the Occupancy certificate for the project, produced by the Respondent, is seen issued on 07.10.2020. Hence undoubtedly the project in question is an ongoing real estate project comes under the purview of the Real Estate (Regulation & Development) Act 2016[hereinafter referred to as "the Act 2016"]. The learned counsel for the Respondents raised contentions that the above complaint will



not come under the purview of the Act 2016, as the agreement between the Complainant and the Respondent was cancelled as early as on 03.06.2016 and the claim raised by the Complainant is barred by limitation as the same ought to have been raised within a period of 3 years from 03.06.2016. The copy of the letter dated 03.06.2016, is produced by both the parties but marked as Exbt. A3, from the part of the Complainant. It is a letter issued by the Complainant to the General Manager of the 1st Respondent Company requesting to cancel the booking of the Flat A1 at Galaxy Carlton and to refund the advance/instalment paid by him, and on the said letter many endorsements are seen made on several dates, even up to the year 2021, by one Shibu with seal of the 1st Respondent company stating that “personally visited the office for getting urgent refund”. So Exbt.A3 Letter cannot be construed as a document showing cancellation of booking of the Flat allotted to the Complainant as it is only a request from him to the Respondent/Promoter to cancel and refund the amount. The endorsements on the said letter reveal that no refund has been done by the Respondent as per the said request letter. Moreover, as per letter dated 28.08.2019, issued by Shibu Applilly, AGM of the 1st Respondent to the Complainant, copy of which is produced by the Complainant and marked as Exbt. A4, stating that the Management has decided to accept the cancellation of booking and the amount will be refunded subject to clause 19 of the agreement for construction dated 05.08.2014 which also discloses that no refund of the amount has been done as on 28.08.2019. From these



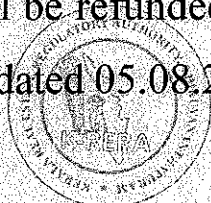
documents, it can be found that even after repeated visits and requests by the Complainant, the Respondents were not ready to refund the amount after cancelling the booking. It is obvious that the process of cancellation shall be taken as consummated only on refunding the amount received by the Respondent from the Complainant. As the project is registered before the Authority under Section 3 of the Act 2016, the provisions of the agreement prescribed as Annexure A to the Kerala Real Estate (Regulation & Development) Rules 2018 shall be applicable. Moreover, such agreements consist of one-sided clauses cannot be acceptable and it was held by the Hon'ble Supreme Court of India in *Pioneer Urban Land and Infrastructure Ltd v. Govindan Raghavan* that "the Agreement contained one-sided clauses, which were not final and binding on the apartment buyers, and would constitute an unfair trade practice." Hence, the contentions put forward by the learned counsel for the Respondents that the above complaint will not come under the purview of the Act 2016, as the agreement between the Complainant and the Respondent was cancelled as early as on 03.06.2016 are not sustainable. The arguments of the learned counsel for the Respondents with respect to period of limitation to file the complaint before this Authority is also not maintainable in the light of the provisions of the Act 2016. Hence for the reasons stated above, it can be safely held that the above complaint is maintainable before this Authority and the Authority have jurisdiction to entertain the complaint. Point No. 1 is answered accordingly.



6. Points No. 2 & 3: The documents produced from the part of the Complainant is marked as Exbt.A1 to A7 and documents produced from the part of the Respondents are marked as Exbt.B1 to B5. As per Exbt.A1, agreement for sale executed between the 1st Respondent represented by the 2nd Respondent and the Complainant, the Respondents agreed to sell 1068/43500 undivided share in the property having a total extent of 24.550 cents for a consideration of Rs.5,21,184/-. As per Exbt.A2, construction agreement executed between the 1st Respondent represented by the 2nd Respondent and the Complainant dated 05/08/2014, the Respondents agreed to construct an apartment No. A-1 on the first floor of the project having super built up area of 968 sq. ft including share in the common area along with a cark park for a total consideration of Rs.30,76,628/- on or before 31/08/2016 and possession will be handed over within 180 days from the date of paying the entire consideration including statutory charges. According to the Complainant, he had paid an amount of Rs.11,75,000/- to the Respondents towards the cost of the apartment. The learned counsel appeared for the Complainant argued that a bank loan was arranged by the Complainant and relevant documents such as loan sanction letter, conditions, schedule, stage by stage progress for release of amounts etc. were submitted to the Respondents. Subsequently, the balance amount was to be released by the bank as per progress in the works as monitored and stipulated by the bank.

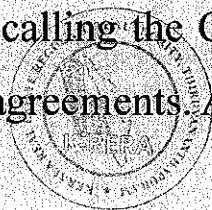


According to the Complainant, when the last payment of Rs.4,00,000/- was paid on 19/06/2015, the progress in the work was zero except some ground clearance done in the project land and for this reason the Bank was not ready to release further amounts in favour of the Respondent / Promoter. The Complainant produced photocopy of a Home Loan Arrangement Letter issued by SBI, Ernakulam RACPC along with schedule of disbursement of the amount, which is marked as Exbt.A7. But no Bank statement or payment receipts are seen produced by the Complainant. Anyhow, the Respondents have not denied receipt of amounts paid by the Complainant. Moreover as per Exbt.A6 copy of statement of account issued by the Respondent/Promoters, it is admitted that the Complainant had paid the said amount of Rs.11,75,000/-. The Complainant has produced copy of a letter dated 03.06.2016, marked as Exbt.A3 given by him to the General Manager of the 1st Respondent Company requesting to cancel the booking of the Flat A1 at Galaxy Carlton and refund he advance/instalment paid by him, on which many endorsements on several dates are seen made by one Shibu with seal of the 1st Respondent company and it is written that "personally visited the office for getting urgent refund". The Complainant also produced another letter dated 28.08.2019, marked as Exbt. A4 issued by Shibu Applilly, AGM of the 1st Respondent stating that the Management has decided to accept the cancellation of booking and the amount will be refunded subject to clause 19 of the agreement for construction dated 05.08.2014. Exbt. A5 series are

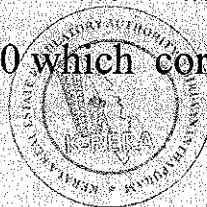


photographs taken by the Complainant on 25.07.2015 which show that only some ground clearance works were done in the project as on that date.

7. The learned counsel appeared for the Respondents raised contentions that the Respondents are bound to complete the construction only in the event of the Complainant paying the money in periodical instalments as agreed in the agreement, but in this case the Complainant did not pay the amount as agreed. The learned counsel for the Respondents argued that from the very beginning, the Complainant had committed defaults in paying the monthly instalments payable in terms of the agreement. Out of the first instalment of Rs.5,16,000/- payable as on 15/09/2014, the Complainant had paid only a sum of Rs.2,50,000/- on 21/02/2015. Thereafter a further amount of Rs.4,00,000/- was paid on 19/06/2015, after which did not pay any amount. The counsel for the Respondents contended that since the Complainant committed defaults in paying the amount agreed to be paid in terms of the agreement, the Complainant is not entitled to get any relief. According to him, the Respondents issued repeated letters and reminders on various dates and thereby requested the Complainant to pay the amounts in terms of the construction agreement. The Respondents produced copies of 3 letters. The copy of letter dated 12.02.2015, which is marked as Exbt.B1 issued by them to the Complainant is the one calling the Complainant to remit the initial amount and execute the agreements. Another letter dated 13.05.2015,



copy of which is produced by the Respondents and marked as Exbt.B2 is a reminder letter issued by them to the Complainant, for making further payments. Exbt. B3 is the copy of Notice issued by the Respondents to the Complainant stating that the Complainant has failed to pay 9 instalments and directing him to pay the due amount within 15 days failing which they would increase the price or cancel the agreement as per the terms of the agreement executed between them. But no documents have been placed on record to show that the said allotment was cancelled by the Respondent/Promoter in furtherance of Exbt.A3 letter. Obviously the cancellation of booking shall be treated as completed only on refunding the amount paid by the Allottee. On perusal of the documents placed on record, it is seen that the promised date of completion was 31.08.2016 as per the terms of the agreement dated 05.08.2014. The last payment was made by the Complainant on 15.05.2015. The photographs taken on 25.07.2015 reveal that only some minor works have been completed as on that date. Needless to say there was no satisfactory progress in the works during the period of 2 years from the date of agreement for which the Complainant/allottee stopped making further payments to the Respondents. So, the contentions of the Complainant that he lost trust and confidence on the Respondent/Promoter and hence he had stopped payments after 15.05.2015 and demanded refund of the amount shall have to be accepted. Moreover, Exbt.B5 would also show that the Respondent/Promoter has obtained the Occupancy Certificate only on 07.10.2020 which corroborates the contention of



the Complainant with regard to the apprehension he had at that time as to further huge delay in completion.

8. Section 18 of the Real Estate (Regulation & Development) Act 2016 stipulates that *“if the promoter fails to complete or is unable to give possession of an apartment, plot or building (a), accordance with the terms of the agreement for sale or duly completed by the date specified therein; or due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall not be liable on demand to the allottee, 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 an 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”*. The Section 19(4) of the Act also specifies that *“The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, 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 agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder". The Hon'ble Supreme Court in its landmark judgment dated 11.11.2021 in M/S Newtech Promoters & Developers Pvt. Ltd. vs State of UP & Ors., also 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. On the basis of the aforementioned facts and findings, I hold that the Respondent/Promoter has failed to complete and hand over possession of the apartment to the Complainant/allottee as promised and therefore the Complainant/allottee is entitled to withdraw from the project and get refunded the amount paid by him to the Respondent/Promoter along



with interest as provided under the Act, 2016. Points No.2 &3 are answered accordingly in favour of the Complainant.

10. Since the Respondents failed to complete the construction as per the agreement before 31/08/2016, the Complainant is eligible to get refund of the amount paid by him under section 18 of the Act, 2016. As per the Complainant, the details of the payment made to the respondents is as follows: -

<u>Date</u>	<u>Amount</u>
16/06/2014	Rs.25,000.00
19/07/2014	Rs.2,00,000.00
19/07/2014	Rs.2,00,000.00
19/07/2014	Rs.1,00,000.00
21/02/2015	Rs.2,50,000.00
19/06/2015	Rs.4,00,000.00
Total	Rs.11,75,000.00

11. 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 13.45% with effect from 15/09/2022. The Complainant is entitled to get 15.45% simple interest on the amount paid, from the date of payment as detailed above in the



payment schedule till the date of refund as per Rule 18 of the Rules 2018. But the Complainant herein prayed for refund of the amount of Rs.11,75,000/- paid by him along with interest from 19.06.2015, the date of receipt of last payment by the Respondents. Hence it is found that the Respondents 1 and 2 are liable to pay Rs.11,75,000/- along with 15.45 % [13.45 (current BPLR rate) +2%] simple interest from 19.06.2015, the date of receipt of last payment by the Respondents.

12. On the basis of the above facts and findings, invoking Section 37 of the Act, this Authority hereby directs as follows:

1. The Respondents 1& 2 shall return the amount of **Rs.11,75,000/-** to the Complainant with simple interest @ 15.45% per annum from 19.06.2015, the date of receipt of last payment till the date of realization.

2. If the Respondents No.1&2 / Promoters fails 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 Respondents No. 1&2 and their assets by



executing this decree in accordance with Section 40 (1) of the Real Estate (Regulation & Development) Act and Rules.

Both parties shall suffer their respective costs.

Sd/-

Preetha P Menon
Member

Copy/Forwarded By/Order



Secretary (legal)

Exhibits**Exhibits marked from the Side of Complainants**

- Ext.A1- Copy of agreement for sale dated 05/08/2014.
- Ext.A2- Copy of construction agreement dated 05/08/2014.
- Ext.A3- Copy of cancellation request dated 03/06/2016.
- Ext.A4- Copy of reply to the cancellation request dated 28/08/2019.
- Ext.A5 series- Photographs.
- Ext.A6- Copy of statement of account issued by Respondents dated 25/10/2017.
- Ext.A7- Copy of home loan arrangement letter issued by State Bank of India.

Exhibits marked from the Side of Respondents

- Ext.B1- Copy of letter dated 02/02/2015 issued to the Complainant.
- Ext.B2- Copy of letter dated 13/05/2015 issued to the Complainant.
- Ext.B3- Copy of letter dated 20/07/2015 issued to the Complainant
- Ext.B4- Copy of letter dated 03/06/2016 issued by the Complainant to the Respondent.
- Ext.B5- Copy of Occupancy Certificate dated 07/10/2020.