



**KERALA REAL ESTATE REGULATORY AUTHORITY  
THIRUVANANTHAPURAM**

**Complaint No. 152/2020**

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

Dated 30<sup>th</sup> June, 2023

**Complainant**

Deepa A R,  
W/o Viswanathan Nair  
Nandanam, Umayanalloor P.O,  
Kollam District, Kerala State  
[By Adv Kalloor K G Kailasnath]

**Respondent**

M/s Thathwamasi properties Pvt. Ltd  
Represented by its Managing Director Mr. Shanil,  
Thodiyil Veedu,  
Near Rajadhanai Auditoriyam,  
Valathungal, Eravipuram P.O,  
Kollam District.



The Counsel for the Complainant Adv. Kalloor K G Kailasnath and the Assistant Engineer of the corporation attended the hearing. Respondent was set ex parte.

### **ORDER**

1. The facts of the case are as follows: - The Respondent/Promoter launched the project named "Thathawamasi Phase I and II" for construction of apartments near Koickal, Kilikolloor Village, Kollam in the year 2003 and given wide publicity. Being attracted by their offer and believing that the construction will be completed as per schedule, the Complainant had booked an apartment having a super built-up area of 1077 Sq. ft on the first floor of the multi-stored building named Thathwamasi Phase – II along with a covered car parking for a total sale consideration of Rs. 14,10,000/-. The Complainant had also entered into a separate agreement with the Respondent/Promoter for the purchase of 1/88 undivided share over the landed property for a consideration Rs. 40,000/-. Both sale agreement and construction agreement were executed with the Respondent/Promoter on 30-01-2008 and thereby entrusted the construction of the apartment to the Respondent/Promoter. As demanded by the Respondent/Promoter, the Complainant had given Rs. 40,000/- towards the value of undivided share over the land. Before signing the said agreement, the Complainant at the instance of the Respondent/Promoter had given an amount of Rs.



50,000/- and after signing the agreement, the Complainant had further given an amount of Rs. 1,50,000/- on 12.03.2008. The Respondent/Promoter promised that the construction would be completed in a time-bound manner. The Respondent/Promoter had given assurance to the Complainant that they would commence construction of the apartment and would complete the same and hand over the completed unit as per the agreement. In spite of receiving money from the Complainant, the Respondent/Promoter had not commenced the construction of the apartment and on repeated enquiry made by the Complainant, the Respondent/Promoter was giving hollow promises and was lagging the commencement of construction on one pretext or another. The Respondent/Promoter had completed phase I units and had only completed the piling work of Phase II apartment units. Since there was no further progress in the work of Phase II apartments, the Complainant had not parted with the balance payment. The Respondent/Promoter had recently converted the area meant for construction of Phase II apartment unit into football ground for giving it on daily rent basis. The Complainant had decided to purchase the said apartment for the residential purpose of her family by utilizing the amenities offered by the Respondent/Promoter. The said desire had become a dream now. Apart from having much mental stress, the Complainant was losing in terms of money also. The financial loss incurred by the Complainant on account of the failure of the



Respondent/Promoter to complete the project as per the norms and deliver the flat is huge. At present, the loss estimated at Rs. 75,000/- which will go up with lapse of time. Due to the indefinite delay in completing the unit, the Complainant had orally demanded the Respondent/Promoter to refund the amount of Rs. 2,40,000/- with interest @ 12% per annum with compensation for the loss sustained by her or to allot any of the vacant units in Phase- I since vacant/unallotted apartments are available in Phase I of the apartment unit. The Complainant had approached the Respondent/Promoter with a request to allow the same and had shown her willingness to pay the balance amount as per agreement. However, the Respondent/Promoter was not ready for the same.

2. The Complainant further submitted that the Respondent/Promoter with a dishonest intention to cheat the Complainant had made a fraudulent representation to the effect that they would complete the construction as per the agreement and induced the Complainant to part with money as above. Actually, the Respondent/Promoter had no intention to hand over the apartment and their only intention was to extort money from the public including the Complainant. Thus, the Respondent/Promoter had made an illegal gain by cheating the Complainant. The reliefs sought by the Complainant is to direct the Respondent/Promoter to allot any of the vacant apartment to the Complainant in the



completed unit for the value mentioned in the agreement after adjusting the amount of Rs. 2,40,000/- already parted and the interest accrued for the said amount till date of allotment or alternatively, to direct the Respondent/Promoter to return the amount of Rs. 2,40,000/- to the Complainant with interest @12% per annum, to direct the Respondent/Promoter to pay compensation of Rs. 2,00,000/- with interest@12% per annum, to direct the Respondent/Promoter to pay cost of the proceedings to the Complainant. The Complainant had produced `copies of the Construction Agreement, sale agreement, payment receipts, series of letters sent to the Respondent by the Complainant, the lawyer notice, cheque.

3. The Authority issued an order dated 20-11-2020 in the above Complaint stating that the prayer for compensation has to be entertained by the Adjudicating officer and dismissed the Complaint directing the Complainant to file a fresh Complaint before the Adjudicating officer in Form N. It was challenged before the appellate Tribunal vide REFA No. 02/2021 Subsequently the earlier order got set aside and remanded back to this Authority for fresh consideration of the alternate prayer for completion and also with direction to the Complainant to approach the Adjudicating officer, if compensation is required with a proper and separate Complaint.

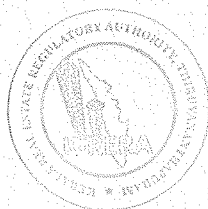


4. After remanding back, the complaint came up for hearing on 01.07.2021 on which day it was directed to take steps for service of notice to the Respondent as the notice sent earlier was returned unserved. On the next day of hearing on 04.08.2021, the counsel appeared for the Complainant sought time for taking steps and on 29.09.2021 only the counsel for the Complainant appeared and found that the notice sent to the Respondent was returned unserved and hence paper publication was ordered. On the next hearing dates on 16.12.2021 and on 21.02.2021, paper publication was not seen produced by the Complainant's counsel who sought one month's time for taking steps and submitting ex parte Affidavit. As the show cause notice sent to the Respondent/Promoter seeking explanation with respect to the violation of Section 3 of the Act 2016 was also returned unserved, the Authority could not ascertain registrability of the real estate project in question and as such the maintainability of the above complaint. Hence on 07.04.2022, the technical division of the Authority was directed to collect the details of the project in question as well as the Promoter. Two officers of the Authority inspected the project site and submitted a report but they could not collect the details of the Project from the local Authority. On 05.06.22, it was directed to issue notice to Kollam Corporation for producing all the details of the project such as permit, plan and Occupancy certificate, if any, issued to the Project in question. On the next hearing date on 01.12.22, counsel for the complainant and



a Representative of the Secretary of Kollam Corporation appeared. The representative of the Corporation submitted that Occupancy Certificate was issued on 23.08.2018. But no documents were produced by the Corporation as directed. As the initial report was seen unsatisfactory, on 09.02.2013, the Authority directed its technical Officers to inspect the project again and submit a detailed report. On 19.04.2023, fresh report was submitted by the officers concluding that the project in question is an ongoing real estate project required to be registered under Section 3 of the Act 2016. But on that day also it was noticed that the counsel for the Complainant had not taken steps for substituted service as directed earlier. Then he was granted with final opportunity to complete substituted service. On the next posting date on 30.06.2023, paper publication has been produced by the counsel for the Complainant and reserved for passing the ex parte order.

5. The documents produced by the Complainant are marked as Exhibit A1 to A9. Affidavit submitted by the Complainant is marked as Exhibit A10. The site inspection reports are marked as Exbt. X1 & Exhibit X2. **Exhibit A1** is the Construction Agreement dated 30.01.2008, which was entered into between the Complainant and Respondent company, represented by its Managing Director. As per the agreement, the Respondent agreed to construct an apartment having a built-up area of 1077 sq.



ft on the 1st Floor of the multi storied building called “Thathwamasy Phase I” along with a covered car parking for a total construction cost of Rs. 14,10,000/-. The completion date and handing over date was specified as 30/06/2009 as per the said agreement. **Exhibit A2** is the agreement for sale dated 30-01-2008 executed between the Complainant and Respondent company, represented by its Managing Director for selling the 1/88 undivided share in the property having 82.992 cents and 37.791 cents with a right to construct an apartment on the 1<sup>st</sup> Floor having a super built up area of 1077 sq.ft in the multi-storied building known as “Thathwamasy Apartments- Phase I” for a total value of Rs. 40,000/-. **Exhibit A3** series is the receipt of payment made by the Complainant to the Respondent. **Exhibit A4** are the Letters sent by the Complainant to the Respondent. **Exhibit A5** is the Lawyer notice issued by the Complainant. **Exhibit A6** copy of the cheque dated 29.04.2014 issued by the Respondent to the Complainant. **Exhibit A7** is the Letter received by the Complainant from the Respondent for not presenting the cheque. **Exhibit A8** series are the Letters sent by the Complainant to the Respondent demanding for the refund. **Exhibit A9** is the Paper publication.

6. In the Exbt. A2 agreement for sale stipulates that “*the First Party made it clear to the Second party that the first party is interested in selling the undivided share in the property only if*





*the second party is prepared to entrust the construction work to the builder Thatwamasy Properties Pvt Ltd.”* On the same day an agreement for construction was executed by the Respondent with the Complainant herein and Clause 6 of the said Agreement stipulates that *“the First Party, the Respondent, shall construct the apartments together with all facilities and try the utmost possible to finish the work on or before 30.06.2009 and possession will be handed over within 15 days after completion provided the entire amount due to the First party from the Second Party, the Complainant, shall be paid by the Second Party.”* It was also stipulated in clause 12 that *“In case of any failure of the second party to pay any two of the installments on or before the stipulated time, the First Party has the discretion to cancel this agreement by giving the second party a 30 days’ notice to this effect in the address mentioned in the agreement.”* Here in this case, no such documents have been submitted proving that the agreements have been cancelled by the parties.

7. As directed by the Authority, the officers of the Authority visited the site of the project “Thathwamasi Phase II”, at Kilikolloor, Kollam on 13/04/2022 & 04/03/2023. On inspection, it was found that the construction of a 10-storied building (G+9 storied) was completed and occupied. Only a security staff was seen at the time of inspection. The security staff informed that the owners association was constituted and a



caretaker was also appointed to co-ordinate the activities of the apartment. When the officers contacted the caretaker on the phone, he refused to provide the phone number or any details of association members and the land owner. The officers visited Kollam Corporation Office also. The file could not be located from the Corporation Office and neither the file number nor the name of the owner was available. The officers again visited the Kollam Corporation Office on 05.07.2022 as per the direction of the Authority and met Secretary & Superintendent Engineer of Kollam Corporation who informed that they could not locate the permit file. However, the occupancy certificate and completion plans were obtained from the corresponding tax file of the revenue section. As per the copy of the occupancy certificate dated 23/08/2018, Permit no. is TP/BRW-106/07-08 dated 24/11/2007. It was reported that since the Occupancy Certificate was issued on 23/08/2018, the project is registrable under section 3 of the Act, 2016. Accordingly, a show cause notice was issued to the permit holder, but there was no response on the same. As directed, the officers of the Authority again visited the site along with the Assistant Engineer, Revenue Inspector and overseer of Kollam Corporation. The Respondent/Promoter or the Land owner was not present. The notice of inspection was sent to the Respondent/Promoter and the owners association which were returned. The officers met some of the inmates in the apartments and came to know that the Respondent/Promoter had been



residing at Kannur for the past few years and the Managing Director of the Respondent/Promoter Company is now the treasurer of the association and was also informed that all the matters related to the association is managed by him. Out of the 43 units, 21 units were allotted with building number, and ownership of 11 units was transferred from the Respondent/Promoter who is not paying the building tax for the apartments owned by him. The officers reported that the place where the project Thathwamasi Phase II was to be built, there is a Football turf seen constructed. The corporation officials also informed that no application was received for the construction of the apartment Thathwamasi Phase II. The Corporation officials also submitted a report stating that as the file is not available, they are not able to provide the building permit for the project, but they have submitted the occupancy certificate for the project.

8. From the report submitted by the Kollam Corporation on 07.02.2023 and the Exbt. X1 & X2 inspection reports, it is revealed that the project was not completed as on 01.05.2017, the date of commencement of the Act 2016 and hence it comes under the purview of the Act, 2016. The Hon'ble Supreme Court in its judgment dated 11/11/2021, in M/s Newtech Promoters & Developers Pvt Ltd. Vs State of UP & another, has reiterated the fact that the Real Estate Projects that are not completed and for which the Occupancy Certificate/Development



Certificate has not been issued on the date of commencement of Real Estate (Regulation & Development) Act, 2016, shall be registered under Sec. 3 of the Real Estate (Regulation & Development) Act, 2016 and such projects will come under the purview of the Act, 2016. The Project in question is not yet registered before this Authority under Section 3 of the Act. The Authority had issued an interim order dated 19/04/2023 directing the Respondents to register the project named "Thathwamasi" under section 3 of the Act,2016 within 30 days from the date of receipt of the order. Despite of receiving the final show cause notice and the interim order dated 19.04.2023, the Respondent failed to register the project under sec 3 of the Act,2016 and hence, the Authority decided to initiate penal proceedings under section 59(1) of the Act, 2016.

9. Here, the reliefs sought are to direct the Respondent/Promoter to allot any of the vacant apartment to the Complainant in the completed building for the value mentioned in the agreement after adjusting the amount of Rs. 2,40,000/- already parted and the interest accrued for the said amount till date of allotment or alternatively, to direct the Respondent/Promoter to return the amount of Rs. 2,40,000/-to the Complainant with interest @12% per annum, to direct the Respondent/Promoter to pay compensation of Rs. 2,00,000/- with interest@12% per annum, to direct the Respondent/Promoter to pay cost of the proceedings to the Complainant. 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 Complainant had decided to withdraw from the project and demanding for refund with interest since 2009.

10. The learned counsel for the Complainant filed argument note and it was additionally submitted that in spite of receiving money from the Complainant, the Respondent/Promoter has not commenced the construction of the apartment and on repeated enquiry made by the Complainant, the Respondent/Promoter was giving hollow promises and was lagging the commencement of construction. Phase I unit was to be constructed on the eastern side of the total extent of land facing main road. As against the agreement, the Respondent initially completed the apartment unit on the western side of property numbered as Phase I, leaving space for construction of apartment unit on the eastern side which was earlier meant for construction of Phase I as per the agreement and has later done piling work only on the eastern side for the apartment unit to be handed over to the Complainant. When the Complainant visited the property, it was realized that the area where the apartment unit was proposed to be built had been converted into a football ground which is beyond the promise made to the Complainant as per the agreement. Since the Respondent has not executed the work of the apartment in time bound manner, the Complainant has expressed her anxiety and the Respondent in turn issued a cheque to the Complainant towards his assurance with a



covering letter addressed to the Complainant which is clear from the Exhibit A 6 & A7. Since the Respondent has not honoured his assurance in completing the construction of the apartment, the Complainant has sent notices on 24-05-2017, 30-08-2018 and 23-10-2018 to the Respondents requiring him to hand over the completed apartment. The Respondent has not acknowledged those notices.

11. As per the Exbt. A2 agreement, the project was to completed on or before 30.06.2009 and possession was to be handed over within 15 days after completion but unfortunately, even after the project was completed after a huge delay of 10 years the Respondents have failed to hand over the flat, or refunded the amount received from the Complainant or cancelled the agreement by issuing 30 days' notice as stipulated in the agreement. Hence it is clear that the Respondent/Promoter has failed pathetically to perform his part and honour the promises given to the Complainant who trusted him and invested their hard-earned savings and have been waiting for a long period in the dream of a roof over the head. 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”.*

12. As mentioned above, notices were sent to the Respondent/Promoter for attending the case on 13/10/2020, 12/11/2020, 9/8/2021, 18/12/2022 and an ex parte notice dated 26/02/2022 was also sent to the Respondent/promoter, but all the notices were returned unserved and unclaimed. Hence the Complainant was directed to complete substituted service subsequent to which Paper publication was produced by the Counsel for the Complainant and then the Respondent/Promoter set ex-parte. Hence it has been found that the Complainant herein is entitled to get allowed with the 1<sup>st</sup> prayer as such in the complaint.

13. In view of the above facts and circumstances, it is found that the Respondent/Promoter has failed to complete and hand over possession of the apartment to the Complainant herein in accordance with the terms of the agreement for sale and so the Complainant in the above complaint is also entitled to withdraw from the project under Section 18 of the Real Estate (Regulation &

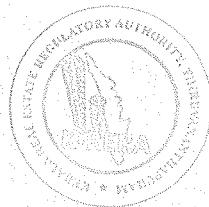




Development) Act 2016, and claim the return of the amount paid by her to the Respondent along with interest from the date of payment till the date of receipt of the amount with interest. As per Rule 18 of Kerala Real Estate (Regulation & Development) Rules 2018, the rate of interest payable by the Promoter 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 @ 16.85 % [14.85 (current BPLR rate) +2%]. But the Complainant herein has limited her claim of interest @ 12% only.

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

1) The Respondent/Promoter shall allot any one of the vacant apartments to the Complainant, in the completed building in the project, for the value mentioned in the agreement after adjusting the amount of Rs. 2,40,000/- already parted and the interest accrued for the said amount till date of allotment **or alternatively,** the Respondent/Promoter shall return the amount of Rs. 2,40,000/-to the Complainant with interest @12% per annum, from the date of payment of amounts by



the Complainants till the date of refund of the total amount with interest.

2) If the Respondent fails 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/-  
Smt. Preetha P Menon  
Member

Sd/-  
Sri. P H Kurian  
Chairman

/True Copy/Forwarded By/Order/

  
Secretary (Legal)

**APPENDIX****Exhibits produced by the Complainant**

1. Exhibit A1- copy of the Construction agreement.
2. Exhibit A2- copy of the sale agreement
3. Exhibit A3- payment receipts
4. Exhibit A4series- Letters sent by the Complainant to the Respondent.
5. Exhibit A5- Lawyer notice.
6. Exhibit A6- copy of the cheque dated 29.04.2014
7. Exhibit A7- Letter received by the Complainant from the Respondent.
8. Exhibit A8series- Letters sent by the Complainant to the Respondent
9. Exhibit A9- Paper publication
10. Exhibit A10- Affidavit submitted by the Complainant.

**Other documents**

1. Exhibit X1- site inspection report dated 13/04/2022 & 04/03/2023
2. Exhibit X2- report and the occupancy certificate submitted by the Kollam Corporation.

