



**KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM**

Complaint No. 168/2023

Dated 28th May 2024

Present: Smt. Preetha P Menon, Member

Complainant

Julian Tom Thomas,
Thannimoottil House,
Pazhavangadi Post,
Ranni-689673, Pathanamthitta District,
Kerala

Respondents

1. Marickar Plantations Pvt. Ltd.,
Represented by its Director,
Shamier Marickar,
A-6, Kent Nalukettu,
Chakkaraparambu, Vennala P.O,
Edapally South village,
Kanayannur Taluk, Ernakulam -682028.



2. Nest Infratech (Nest Realities India Pvt. Ltd.),
5th Floor, Compass, NH47 By-pass,
Chakkaraparambu, Near Vysali Bus Stop,
Cochin, Kerala-682032.
(Represented by F.M. Shamier Marickar)
3. F.M Shamier Marickar,
A-6, Kent Nalukettu,
Chakkaraparambu, Vennala P.O,
Edapally South village,
Kanayannur Taluk, Ernakulam -682028.

The above Complaint came up for virtual hearing on 12/02/2024.
The Complainant and the 3rd Respondent attended the hearing.

ORDER

1. The facts of the case are as follows:- The Complainant had booked a flat having a built-up area of 1150 sq. feet marked as 4 A2 on the 4th floor including proportionate share of common areas and facilities together with the right to use a covered car parking in the Orchid Park along with the undivided indivisible right of title and interest in the land consists of 1150/205000 undivided share. The Allotment letter was provided by the Respondent on 4th July 2022 and the Respondent executed a Sale and Construction Agreement in favour of the Complainant. The Respondent promised to complete the said construction of project and flat registration on

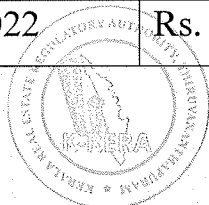


or before 30th September 2022 with a further grace period of 3 months i.e., on 30th December 2022. The Respondent did not fulfill the promise despite receiving the entire consideration on time. The Complainant have invested Rs. 35,00,000/- of the agreed-upon total of Rs. 3,800,000/- with the remaining funds being retained for registration. The Nest Orchid Park association has already filed a case for the entire completion of the Project with C No. 79/2023. The reliefs sought by the Complainant are to (i) direct the Respondent to register the Sale Deed for 4A2 Flat in favour of the Complainant without any delay. (ii) direct the Respondent to pay the interest for the amount paid up to August 2023, which is Rs. 3,91,062/-. Additionally, provide payment for remaining interest due until completion of the project monthly Rs. 49,146/- as per the RERA Calculation (SBI PLR, 14.85+ 2%) for the amount collected from the date of entrust till the date of realization.

2. The Respondents filed written statement and stated that the Complaint filed by the Complainant is not maintainable either in law or in fact. The Complaint is hit by Section 18 of the Real Estate (Regulation and Development) Act, 2016. The reliefs sought in the Complaint are not within the jurisdiction of the Authority. Thus, the Complaint as framed and the reliefs sought cannot be entertained by the Authority. The complainant has filed this Complaint only on an experimental basis and hence it is liable to be dismissed. The first Respondent has no

privity of contract with the Complainant. No consideration is paid by the Complainant to the first Respondent or received by the first Respondent from the Complainant. Hence the first Respondent is an unnecessary party to these proceedings and not liable. Regarding the averments and allegations in the Complaint. It was submitted that the Complainant is a chronic defaulter. The Complainant ought to have paid Rs. 38 Lakhs on or before 31.11.2022 towards the sale consideration of apartment No. 4A2. Whereas the Complainant has made the following payments belatedly totalling to Rs. 34,99,900/- as detailed below: -

Sl. No	Date	Amount
1	15.07.2022	Rs. 10,00,000.00	
2	17.08.2022	Rs. 5,900.00	Loan Application fee to LICHFL
3	07.09.2022	Rs. 44,000.00	
4	02.10.2022	Rs. 34,000.00	Payment to Fenetex Global
5	11.10.2022	Rs.10,000.00	" "
6	29.10.2022	Rs. 10,00,000.00	Payment to Owner's Association
7	07.11.2022	Rs. 3,00,000.00	" "
8	16.11.2022	Rs. 3,00,000.00	" "
9	07.12.2022	Rs. 7,12,000.00	" "
10	28.12.2022	Rs. 50,000.00	Direct payment on



			handing over
11	28.01.2023	Rs. 22,000.00	
12	11.03.2023	Rs. 22,000.00	

3. The possession of the apartment No. 4A2, Orchid Park in Vijayapuram Village, Kottayam Taluk was handed over to the Complainant on 25.12.2022 though the payments were still pending from the Complainant. The Complainant joined hands with the owner's association and diverted the payment to the owner's association. Finally, the second Respondent was forced to accept the said payments onto the account of the Complainant. Complainant even prevailed upon the second Respondent to account Rs. 5,900/- the payment said to have been made by the Complainant to LIC Housing Finance Ltd as the application fee for home loan application. The default of the Complainant continues even after occupying the apartment on 25.12.2022 and an amount of Rs. 3,00,100/- is due to the second Respondent towards the sale consideration. From 25.12.2022 onwards Complainant is occupying apartment No. 4A2 in Orchid Park. The owners in Orchid Park are occupying their respective flats from 01.05.2018 onwards. The second Respondent has been maintaining the apartment complex Orchid Park from 01.05.2018 and as on today the second Respondent had incurred an amount of Rs. 64,95,840/- towards electricity charges, Rs. 17,25,000/- towards security charges, Rs.



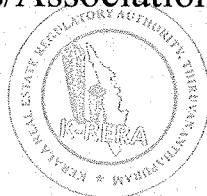
16,56,000/- towards housekeeping Rs. 4,14,000/- towards waste disposal charges, Rs. 20,70,000/- towards supervisory charges and Rs. 60,000/- for maintaining the sewage treatment plant, totaling to Rs. 1,24,20,840/-. Whereas the Complainant who is occupying apartment No. 4A2 from 25.12.2022 has paid only one month's monthly maintenance charge as MMC for August 2023 as per receipt No. 44 dated 13.09.2023 for Rs. 1,500/-. Complainant is enjoying all the amenities in Orchid Park, electricity, water, housekeeping, security etc free of cost. Suppressing these vital facts Complainant has approached the Authority claiming interest for the amount paid and compensation for the alleged delay in completion of the apartment project. The second Respondent is charging only Rs. 1,500/- as monthly maintenance charges from the owners/tenants/occupants in Orchid Park. Whereas the Complainant has defaulted even the said sum of Rs. 1,500/- charged as monthly maintenance for all amenities including electricity, water, housekeeping, security etc. An amount of Rs. 19,500/- is due from the Complainant as arrears of monthly maintenance charges. Suppressing the aforesaid vital facts, Complainant has approached this Hon'ble Authority seeking interest for the payment and the alleged delay compensation. Complainant did not pay the balance sale consideration of Rs. 3,00,100/- hence not entitled for execution of the conveyance deed of Flat No. 4A2 in his favour. The complainant has no



cause of action against the Respondents in the facts and circumstances of this case. The Complaint is bereft of any bonafide and an abuse of the process of the Authority. Thus, the Complaint may be dismissed with the compensatory cost to the Respondents.

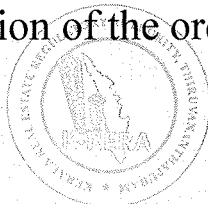
4. The project in question is a registered project before this Authority under Section 3 of the Real Estate (Regulation & Development) Act 2016 [hereinafter referred to as the “Act 2016”] in which the proposed date of completion is shown as 30.09.2022. On perusal of the web page concerned, it is seen that the Respondents have not uploaded the occupancy certificate from which it is clear that the project is still not completed and the occupancy certificate has not been obtained for the same.

5. The Authority had heard other 24 complaints related to the same project issued a common order dated 20/05/2021 directing the Respondents 1) To complete and hand over, the project ‘Nest Orchid Park’ 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 31.08.2022 without fail. 2) To complete all the executions of sale deeds, if any, related to apartments / common areas in favour of allottees/Association. 3) To 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 the above said period. 4) To give the Complainant in Complaint No. 326/21, the No due Certificate, Non-Lien Certificate, and cark parking allotment with regard to the apartment of the said complainant as prayed in IA No. 96/22, within one month from the date of receipt of this order. 5) The Respondent to submit before this Authority, the compliance report in the form of an affidavit on 01.09.2022. It was also stipulated that if the Respondent / Promoter fails to complete the entire works of the project and hand over the apartment as stated above, the Respondent/ Promoter shall be liable to pay Rs. **25,000/- per day** from **01/09/2022** to the date of actual compliance with the said direction, as provided under Section 63 of the Real Estate (Regulation & Development) Act, 2016.

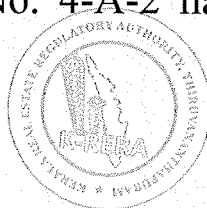
6. Thereafter, one of the Complainant among the above said 24 Complainants filed an Execution Petition and submitted that the above directions have not been complied with so far by the Respondents. The Respondent No. 3 filed an affidavit therein and assured that the pending works will be completed by 30/10/2023. Then the Authority directed the Judgement Debtors/Respondents to file a compliance report on the same after completing the works and also directed to remit the amount of penalty for violation of the order dated 20.05.2021.



7. After hearing both sides and perusing the pleadings and documents submitted by both the parties with respect to the claim of the Complainant for interest for delay, the following points are being considered and decided herewith:

- i. 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 or duly completed by the date specified therein or not?
- ii. Whether the Complainant herein is 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?
- iii. What order as to costs?

8. **Points No. 1&2:** The documents produced by the Complainant are marked as **Exhibits A1 to A3**. **Exhibit A1** is the allotment letter dated 04/07/2022. **Exhibit A2** series are the payment receipts. **Exhibit A3** is the sale and construction agreement dated 14.07.2021 executed between the Complainant and the Respondent No. 1 and 2 companies represented by Respondent No. 3 for sale of 1150/205000 undivided share equivalent to 0.55 cents together with right to construct a two bedroom apartment No. 4-A-2 having a super built-up area of



1150 sq. ft in the Fourth Floor in the said project and proportionate share in the common areas and common facilities and a covered car parking area for a total consideration of Rs. 38,00,000/- in which the promised date of completion is shown as 30.09.2022 with 3 months grace period.

9. As the other prayers in the above complaint have already been adjudicated and order has been passed, the only prayer to be considered herewith is that for the direction to pay interest for delay in completion and handing over the apartment allotted to the Complainant. 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 Complainant has opted to continue with the project and claimed interest for delay in handing over possession of the apartment to him.

10. As per Exbt. A3 sale and construction agreement, Clause No. 2 is as follows: *“The Builder has completed substantial part of the construction and undertakes to ensure 100% completion of the said construction on or before 30th September, 2022 with a further grace period of 3 months.”* Exhibit. A3 agreement is seen executed between the Complainant and the Respondent No. 1 and 2 companies represented by Respondent No. 3 for sale of 1150/205000 undivided share equivalent to 0.55 cents together with right to construct a two bedroom apartment No. 4-A-2 having a super built-up area of 1150 sq. ft in the Fourth Floor in the said project and proportionate share in the common areas and common facilities and a covered car parking area for a total consideration of Rs. 38,00,000/- in which the promised date of completion is shown as

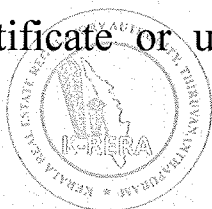


30.09.2022 with 3 months grace period. According to the Complainant, the Respondents have not handed over the possession to the Complainant. The Respondents submitted that the possession was handed over on 25-12-2022 itself and hence there is no delay in the part of the Complainant. It is understood from the documents submitted and the web portal of the Authority that the project is still not completed and the occupancy for the same has not been obtained so far. Before obtaining the occupancy certificate, the Respondents are not supposed to execute the sale deed in favour of any of the allottees.

11. Here, the main contention of the Respondents is that the completion date was subject to the performance on the part of the complainant 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 as a breach on the part of the promoter. It was also argued by the Respondent No. 3 that the complainant herein had violated the terms of the agreement when he failed to pay monthly instalments. Anyhow, on examination of Exhibit A2 series, it reveals that the Complainant had made most of the payments before the promised date of completion. With regard to the contentions raised by the Respondent/Promoter that there was failure from the part of the Complainant in paying instalments on time, no documents/communications produced from the side of the



Respondents to substantiate this contention and the Respondents could have sent notice of cancellation of booking to the Complainant 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. In view of this, the Respondents have no right to blame the Complainant for any delay/irregularity in payments. Here, the promised date of completion and handing over was 30-09-2022 and the Respondents claim that they have handed over the possession on 25-12-2022, but no supporting documents have been submitted for proving the same. At the same time the Respondent No. 3 admits that the Occupancy Certificate has not been obtained for the project till date. Without obtaining the occupancy certificate, how could he hand over possession of the flat to the Complainant/ Allottee? It can be seen that the delay in final payments occurred due to the non-completion of work as promised by the Respondent/Promoter. Till date, the respondents have not completed the project and the occupancy certificate has not been obtained. As stated above, the Respondents could not complete the project as promised to the Complainant 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 submitted the occupancy certificate or uploaded Form-6 Certificate showing



completion of the project. Hence, it has been established that the Respondents/Promoters have grievously failed to complete the project and hand over to the Complainant on the date of promise as per the terms of the agreement.

12. Under Section 11(4) of the Act, 2016, the Respondents/Promoters are responsible to obtain the occupancy certificate, from the Competent Authority and after obtaining all the mandatory sanctions for the project, the Promoters are bound to hand over physical possession of the building/ apartments to the allottees therein. 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”*.



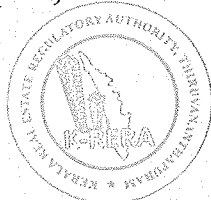
13. With respect to the right of the allottees for getting interest for delay in getting handed over the apartments in such cases, certain remarkable observations were made by the Hon'ble Supreme Court in its judgement Wg. Cdr. Arifur Rahman Khan & others vs Dlf Southern Homes Pvt. Ltd., as follows: “.....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 Complainant/allottee had made delay in any of the payment of instalments, the Promoter has undoubtedly made use of the investments of the Complainant's hard-earned money for the past years and failed to complete the work and hand over possession as per the terms of the agreement.

14. 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.A3 the Respondents should have handed over possession of the



apartment on 30-09-2022, and the Complainant could take over possession within the grace period. Since the Respondents could not hand over possession as per the terms of the agreement, the Complainant 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 reproduce here, the 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 which are 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”.*

15. In view of the facts and findings discussed in the foregoing paragraphs, it has been revealed beyond doubt that the



Respondents/Promoters have failed to complete and hand over possession of the apartment as promised to the Complainant herein and hence the Complainant is entitled to get interest for delay in handing over possession as provided under the proviso to Section 18(1) of the Act 2016. Points No. 1 & 2 are answered accordingly in favour of the Complainant.

16. In the instant case, the Complainant had remitted a total amount of **Rs. 35,00,000/-** to the Respondents and the Complainant prayed for interest for the delayed months. According to the complaint, the Complainant has paid an amount of **Rs. 10,44,000/-** before the promised date of completion, i.e., 30.09.2022. As the Respondent/ Promoter is a defaulter, he is not entitled to get the benefit of the grace period mentioned in the Exhibit A3 agreement. The respective dates of payments and amounts in total are as follows:

Date	Amount in Rs.
01.08.2022	10,00,000/-
07.09.2022	44,000/-
15.10.2022	44,000/-
29.10.2022	10,00,000/-
07.11.2022	3,00,000/-
20.12.2022	10,12,000/-
28.12.2022	50,000/-
11.03.2023	50,000/-



Total	35,00,000/-
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17. As the Complainant is found entitled to get interest for the delayed handing over of possession, the Respondents are liable to pay interest to the complainant as per the proviso to Section 18(1) of the Act, 2016. Hence the Complainants are entitled to get interest for the period from 01/10/2022, the promised date for handing over till the actual date of handing over possession, on Rs. 10,44,000/- which is the amount paid by him before the promised date of completion and also, he is entitled to get interest from the dates of payment of each amount, as shown in the table inserted above, paid after the promised date of handing over till the actual date of handing over possession. 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%].

18. 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/Promoters are hereby directed as follows:



1) The Respondents/Promoters shall pay to the Complainant, simple interest @ 16.85% per annum, (a)for Rs. 10,44,000/-, the amount paid before 30/09/2022, the promised date of completion and handing over, for every month from 1/10/2022 till the date of handing over possession of apartment to the Complainant and (b) for the amounts paid after 30/09/2022, from the date of each payment as mentioned in the table inserted above in para 16 till the date of handing over possession of the apartment to the complainant.

2) If the Respondents fails 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 Complainant is 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 2016 and Rules 2018.

Sd/-
Preetha P Menon
Member

/True Copy/Forwarded By/Order/


Secretary (Legal)

APPENDIX

Exhibits produced by the Complainant

- Exhibit A1 - Copy of the Allotment Letter.
- Exhibit A2 series- Copy of the payment receipts.
- Exhibit A3 - Copy of the sale and construction agreement.

Exhibits produced by the Respondent

Nil