



**KERALA REAL ESTATE REGULATORY AUTHORITY**  
**THIRUVANANTHAPURAM**

**Complaint No. 193 /2022**

Dated -12<sup>th</sup> January 2023

Present: Sri. M. P. Mathews, Member

**Complainant**

1. Sathyanarayanan,  
Flat No.B 602, Ebony Block,  
Godrej, Woodsman Estate,  
Near Columbia Asia Hospital,  
Hebbal P.O, Bengalore-560024.
2. R Sreelatha,  
Flat No.B 602, Ebony Block,  
Godrej, Woodsman Estate,  
Near Columbia Asia Hospital,  
Hebbal P.O, Bengalore-560024.

(Adv. B Premnath)

**Respondents**

1. M/s Asten Realtors Pvt.Ltd.,  
Represented by its Managing Director,  
Siraj Mather,  
Compass Building, 4<sup>th</sup> floor, 45/1926,  
NH Bypass, Chakkarapparambu,  
Kochi-682 032.



2. Aster Mather,  
 Managing Director,  
 M/s Asten Realtors Pvt.Ltd.,  
 28, Asten NH Bye pass, Palarivattom,  
 Vennala P.O, Cochin-682 028.

(Adv.Praveen K Joy)

The above Complaint came up for virtual hearing today. Counsel for the Complainant & Counsel for the Respondents attended the hearing.

### ORDER

1. The Complainant is an allottee of the project named 'Asten Nautica' located at Kumbalam, Ernakulam District, developed by the Respondents. The said project is registered with the Authority under section 3 of the Act, 2016 (Registration No. K-RERA/PRJ/102/2021) and the registration is valid upto 30/12/2025.

2. The Complainants have booked an apartment No.10 A in the 10<sup>th</sup> floor having an area of 3980 sq.ft. along with two car park and they have entered into two agreements viz., land agreement and a construction agreement with the Respondent on 02/09/2013 for purchasing 1725/100000% of undivided interest in respect of the property described in the schedule properties therein (with reference to Apartment No.10A, 10<sup>th</sup> floor) having an area of 3980 sq.ft and two car park to be constructed in the said project. The Respondents have agreed to construct for the Complaints, the



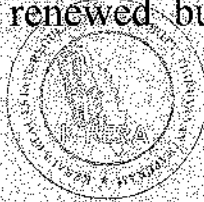
apartment more specifically described in schedule A to the Construction agreement dated 02/09/2013 for a consideration of Rs.1,67,74,720/-. As per the said agreement, the Complainants have agreed to pay the sale consideration to the Respondent together with consideration for the sale of undivided share of land amounting to Rs.10,98,480/- in terms of the land agreement and statutory charges of Rs.24,21,331/- including stamp duty, registration and related charges, deposit and service connection charges for KSEB in the manner indicated in the said agreement based on the stages of construction. The aforesaid amount of Rs.10,98,480/- was to be paid by the Complainants to the Respondent on the dates and in the manner provided separately in the schedule of payments.

3. The Complainants further submitted that based on the payment schedule in the construction agreement the Complainant have paid an amount of Rs.1,63,11,829/- to the Respondents at different stages of construction out of the total amount of Rs.2,02,94,531/-. As per clause 17 of the construction agreement the Respondents agreed to complete the construction of the apartment within 30 months from the date of agreement. The Respondents have not so far completed the construction of the apartment as agreed and has not handed over to the Complainants till date. On 18/07/2019 the Respondent has addressed the 1<sup>st</sup> Complainant by email and admitted the delay and offered the



Complainants compensation as per clause 11 of the agreement till July 2019 and thereafter from August 2019 till the completion of the project and proposed 10% interest per annum also. The 1<sup>st</sup> Complainant replied to the Respondent on 20/07/2019 by email stating the compensation has to be paid as per the provisions of the Act, 2016 and Rules 2018 and also pointed out that the compensation proposed by the Respondent is inadequate. The Respondent replied to the said email dated 20/07/2019 stating that the funds are not coming as expected and the demand for compensation at exorbitant rates will get him into deeper troubles.

4. The Complainant further submitted that on 23/09/2020, the Respondents sent a communication to the Complainants with a claim that the project is being delayed due to the fact that the real estate sector is the most affected because the economy had hit the worst depth ever and requested the Complainants to pay the balance amount due. Thereafter the Complainants issued a registered lawyer's notice to the Respondent on 27/10/2020 claiming refund of the entire amount paid by the Complainants along with interest applicable as per the provisions of RERA. On 01/12/2020, the Respondents issued a reply notice by admitting the payment of Rs.1,63,11,829/- made by the Complainants and also admitted that they could not finish the work on account of want of renewed building permit from the local



authority. The renewal request of the building permit was kept idle by the Panchayath and unnecessarily delayed pointing out the absence of coastal regulation zone clearance and the rescheduled completion date of the project is within December 2021. Admitting the delay the Respondent offered to the Complainant that if they wanted to cancel the booking, the Respondent is prepared to cancel the booking and prepared to refund the amount collected along with interest as per RERA norms within a period of one year from this date ie., December 2021.

5. It was further submitted by the Complainant that the Kumbalam Grama Panchayath issued building permit on 13/06/2013 for construction of ground floor and parking area, security cabin, 1<sup>st</sup> floor, 2<sup>nd</sup> Floor and machine room only. Later on 19/02/2014 permit was extended for construction of ten floors and is valid for 3 years. On 23/09/2017 permit was again renewed for 3 years and the permission was granted to construct up to the terrace of 19<sup>th</sup> floors. On 17/08/2020 the panchayath issued a letter to the lands owners pointing out that they have to submit a revenue sketch of the land showing the construction is being carried out within the permitted distance (50 mts.) from back waters. Another communication was also issued by the Kumbalam Grama Panchayath to the land owners on 17/08/2020 pointing out that the



permit can be renewed only after the 'Height Clearance NOC' issued by the Naval Command.

6. The Complainants further submitted that in W.P.(C) No.20293/2020 filed by the Respondents herein, the Kerala Costal Zone Management Authority and its member Secretary were Respondents 3 & 4. A joint counter affidavit was filed by them stating that the 'area involved in the construction of the apartment falls under No development Zone of CRZ III and the project proponent shall seek prior CRZ Clearance and the building permit issued without clearance is illegal and void. On 21/12/2020 the Hon'ble High Court disposed the said petition directing the 'Kumbalam Grama Panchayath to measure out the distance to the construction of the apartment from the back waters and then to take a decision on the application for renewal of the building permit by the land owners'.

7. It was further submitted by the Complainants that they are convinced that the Respondents will not complete the project in the near future. Since the Complainants are not interested in the aforesaid project they have decided to withdraw from it and the Respondents also agreed to reimburse the amount invested by the Complainants including the interest as stipulated by RERA. The time schedule of 1 year proposed by the Respondent is not agreeable to the Complainants. Hence this Complaint.



8. The reliefs sought by the Complainant is refund of Rs.1,63,11,829/- along with interest as per Rule 18 of Rules 2018 along with future interest at that rate till its realization.

9. The Respondents have filed written statement and denied all the averments and allegations in the Complaint and submitted that the above Complaint is not maintainable before the Authority as the complainants and the respondents are bound by contractual obligations entered in to between them and as such the remedy of the complainant lies else were. The respondents themselves had apprised the complainants about the delay being occurred in the matter of completion of the building and it was also informed that the work is over and the completion of the project work is getting delayed only on reasons beyond the control of the respondents. The completion of the project was rescheduled and it was proposed to be completed within time.

10. The Respondents further submitted that they obtained a building permit on 13.06.2013 to construct a multi storied residential building within Kumbalam Grama Panchayat. This was twice renewed. The respondents pursuant to the permission, completed the structure. The respondents sought renewal of the building permit. At that time, the panchayat insisted the respondents to produce clearance from the CRZ Authority and Southern Naval Command. Hence the petitioner approached the Hon'ble High Court



by filing WPC No.20293/2020. After hearing both sides the Hon'ble High Court disposed the case on 21.12.2020 as follows: (1) all the islands in the backwaters of Kera/a shall be covered under the CRZ notification; (2) the islands within the backwaters shall have 50 mts width from the High Tide Line on the landward side WP(C).No.20293 OF 2020(1) 3 as the CRZ area; (3) within 50 mts from the HTL of these backwater islands existing dwelling units of local communities may be repaired or reconstructed however no new construction shall be permitted; (4) beyond 50 mts from the HTL on the landward side of backwater islands, dwelling units of local communities may be constructed with the prior permission of the Grama Panchayat; (5) Foreshore facilities such as fishing jetty, fish drying yards, net mending yard, fishing processing by traditional methods, boat building yards, ice plant, boat repairs and the like, may be taken up within 50 mts width from HTL of these backwater islands." According to the petitioners in the said appeal the construction is beyond 50 meters from High Tide Line (HTL) and they can construct building with prior permission of the Grama Panchayat. Taking note of the similar contention, this Court, after referring to the report of the Institute of Remote Sensing, Anna University directed the panchayat to consider the renewal as follows:- dispose the writ petition, by directing the 1st and 2nd respondents to consider application submitted by the petitioners for building permit and on the basis of report I make it clear that, if the





*Panchayat has any doubt with regard to the distance from the High Tide Line on the landward side, it will be open to the Panchayat to measure the distance at which the petitioners are proposing to put up the construction, with the assistance of the Taluk Surveyor, before issuing the building permit sought for by the petitioners. The respondent Panchayat shall consider and pass orders on the application for building permit within three weeks from the date of receipt of a copy of this judgment. The learned Counsel for the panchayat submits that they may not have any difficulty in measuring the distance from HTL. However, it is submitted that the petitioners have to produce NOC from Southern Naval Command. The learned Standing Counsel for the CRZ Authority submits that the report of the accredited agency cannot be relied on. The report submitted by the very same agency have been doubted by the National Green Tribunal in O.A.No.116/2016. The learned Standing Counsel also submitted that the property falls under CRZ {III} and no construction is permissible under law. As seen from the Coastal Regulation Zone Notification, in regard to islands in the State, the panchayat is competent to grant permission provided, they are satisfied that the land is situated beyond 50 meters from HTL. The panchayat should also be satisfied of the report of accredited agency apart from undertaking a physical measurement. It is for the panchayat to decide whether the report can be relied or not. In the light of the judgment in WP{C} No.1845/2017, I am of the view that if the*



*panchayat is satisfied that the construction is beyond 50 meters from the HTL, they shall renew the building permit on being satisfied with compliance of other requirement under law. Need full shall be done within a period of one month.* The writ petition is disposed of as above. Aggrieved by the order the Coastal Regulatory Authority Filed WA No.676/2021 before the Division Bench and the same is still pending.

11. It was further submitted by the Respondents that the entire matters are pending consideration before the Hon'ble Court and it is still pending. The complainants are not entitled to get any interest to the amount paid by them for the construction of the apartment. In fact they have not paid the entire amount as per the schedule of payment of contract. The default non-payment is violation of terms of agreement. The respondents are taking all steps to complete the constructions at the earliest. The agreements executed between the complainant and respondents are containing arbitration clause. Hence the parties are bound to attend arbitration. It is specifically contented that the complaint is not maintainable as alleged dispute in between the complainant and the respondents which cannot be adjudicated by the authority under the Act and the same is adjudicated only through arbitration proceedings because of the agreement contains Arbitration clause. Moreover the 'arbitration proceedings' are before RERA enactment.



12. The Respondents further submitted that due to the flood and Covid-19 restrictions, there is a slight also delay happened to handed over the flat to the complainant. In the year 2018-19 severe floods in Kerala affected the construction work and this was followed by Covid-19 pandemic situation in the year 2020 also affected the progress of the construction. Still the construction is in the last stage. The Complainant's flat is allotted and will be finished, on direction from permission from Hon'ble Division Bench of the High Court of Kerala. The complainants are well aware about the cases pending before the Hon'ble High Court and stay granted by the Hon'ble Court. The delay caused not due to the negligence from the part of respondents. The complainants are not entitled to get any relief from this Forum.

13. The Authority heard the learned counsel for both the parties and gave careful consideration to the submissions, and perused the material documents available on record. The documents produced from the part of the Complainant is marked as Exbt.A1 to A13. No documents were produced from the part of the Respondents.

14. **Exbt.A1** is the copy of Land agreement dated 2/09/2013 executed between the Complainant and the 1<sup>st</sup> Respondent represented by its Manging Director Mr. Siraj Mather. Based on the joint venture agreement dated 01/06/2013 the 1<sup>st</sup> Respondent agreed to sell 1725/100000% of undivided interest in the land, in order to



hold Apartment No.10A on the 10<sup>th</sup> floor in Tower 1 for a total consideration of Rs. 10,98,480/-.

15. **Exbt.A2** is the copy of construction agreement dated 2/09/2013 executed between the Complainant and the 1<sup>st</sup> Respondent represented by its Managing Director Mr.Siraj Mather and the Complainants agreed to purchase an apartment No.10A in the 10<sup>th</sup> Floor, Tower 1, admeasuring area of 3980 sq.ft along with two car parking. It was also stated in the agreement that the Respondent shall complete the construction of the apartment within 30 months and also handover possession of the apartment within 30 days after completion of the project.

16. **Exbt.A3** is the copy of statement of account issued by the Respondents. It is clear from the said statement that the Respondents have collected an amount of Rs.1,63,11,829/- from the Complainants.

17. **Exbt.A4** is the copy of email dated 18/07/2019 issued to the Complainant stating apologies for the delay in delivering the apartment and also offered compensation as per the agreement till July 2019 and 10% interest per annum from August 2019 till the completion of the project.

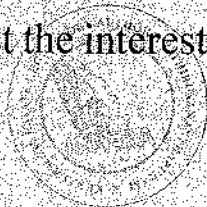


18. **Exbt.A5** is the copy of email dated 20/07/2019 issued by the Complainants stating that the compensation has to be paid as per RERA provisions . **Exbt.A6** is the copy of e-mail dated 23/09/2020 issued by the Respondents requesting to pay the balance amount due and they will complete the project within 12 months.

19. **Exbt.A7** is the copy of registered lawyer's notice dated 27/10/2020 issued to the Respondents demanding refund of the entire amount paid by the Complainants with interest as per the provisions of RERA along with compensation of Rs.25 Lakhs.

20. **Exbt.A8** is the copy of reply notice issued by the Respondents admitting the delay occurred in completion of the project and admitted the receipt of payment of Rs.1,63,11,829/- made by the Complainants and explained the reasons for delay occurred in completion of the project.

21. Though the Respondent had raised the issue that the matter can be settled under the Arbitration and Conciliation Act, 1996, the Hon'ble Supreme Court decision in Emaar MGF Land Limited v. Aftab Singh (2018 KHC 6983 Supreme Court) has categorically made it clear that where specific/special remedies are provided for and which are opted by an aggrieved person the judicial Authority can refuse to relegate the parties to arbitration. The Act, 2016 is intended to protect the interest of consumers in the real estate



sector and specific special remedies are provided for and the aggrieved person has approached the Authority to protect his interest under the Act, 2016 and the complaint is maintainable before the Authority.

22. From Exbt.A1 to A8 it is clear that the Respondents failed to complete the project as per the agreement and the Respondents admitted the delay and offered compensation, but they neither refunded the amount received from the Complainant nor paid any compensation till date. Hence the Complainants are entitled to withdraw from the project and claim refund along with interest.

23. From Exbt.A3 it is clear that the Respondents have received an amount of Rs.1,63,11,829/- from the Complainants. In Exbt.A8 the Respondents also admitted the said payment. The details of the payment made to the respondents is as follows:-

<u>Date</u>	<u>Amount</u>
01/09/2013	Rs.56,72,116.00
25/08/2014	Rs.19,57,840.00
10/06/2015	Rs.19,29,305.00
31/10/2015	Rs.19,29,305.00
30/01/2016	Rs.19,29,305.00
07/04/2016	Rs.14,46,979.00
18/07/2016	Rs.14,46,979.00

**Total**

**Rs.1,63,11,829.00**



24. 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*". Here, in this case the Allottee is entitled to claim refund of the amount paid with interest, as the promoter failed to complete and is unable to give possession of the apartment as per the agreement.

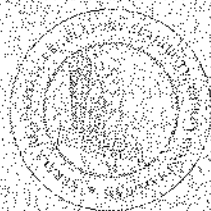
25. While discussing the objects and reasons of the Act 2016 Supreme Court in Judgement dated 11/11/2021 M/s Newtech Promoters and Developers Pvt. Ltd Vs State of UP & Others had made a very important observation and the same is reproduced below "*The unqualified right of the allottee to seek refund 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/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".* On the basis of the aforementioned fact and findings, it is found 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 Section 18 of the Act, 2016.

26. Hence, the Respondents are liable to refund the amount received from the complainant along with interest according to section 18(1) of the Act, 2016. 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 14.15% with effect from 15/12/2022. The Complainant is entitled to get 16.15% 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 Complainants limited their claim to 14.75% interest. Hence it is found that the Respondent's 1 and 2 are liable refund an amount of



Rs.1,63,11,829/- to the Complainants along with 14.75 % simple interest from the date of receipt of payment by the Respondents.

27. Based on the above facts and findings, invoking Section 37 of the Act, this Authority hereby issues the following directions :-

1. The Respondents 1& 2 shall return the amount of Rs.1,63,11,829/- to the Complainant with simple interest @ 14.75% per annum from the date of each payment, as per the schedule till the date of realization.

2. If the Respondents fail to pay the aforesaid sum 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 aforesaid sum from the Respondent No.1 and its assets & Respondents No.2 and his assets by executing this decree in accordance with the Real Estate (Regulation & Development) Act and Rules.

Sd/-  
Sri M.P Mathews  
Member

/True Copy/Forwarded By/Order

  
Secretary (legal)

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

- Ext.A1- Copy of land agreement dated 02/09/2013.
- Ext.A2- Copy of construction agreement dated 02/09/2013.
- Ext.A3- Copy of account statement of Respondent dated 8/4/2019.
- Ext.A4- Copy of email dated 18/07/2019.
- Ext.A5- Copy of e-mail dated 20/07/2019.
- Ext.A6- Copy of e-mail dated 23/09/2020.
- Ext.A7- Copy of lawyers notice dated 27/10/2020.
- Ext.A8- Copy of reply notice dated 01/12/2020.
- Ext.A9- Copy of building permit dated 13/06/2013.
- Ext.A10- Copy of building permit dated 19/02/2014.
- Ext.A11- Copy of building permit dated 23/09/2017.
- Ext.A12- Copy of communication dated 17/08/2020 issued by Kumbalam Grama Panchayath.
- Ext.A13- Copy of judgement of the High Court in WPC No.20293/2020 dated 21/12/2020.

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