



**KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM**

Complaint No. 2/2022

Present: Sri. M P Mathews, Member

Dated 10th March 2023

Complainant

C Gopakumar,
Royal Gardens Apartments,
L3 A, S.N. Junction, Oppo. Milma,
Tripunithura, Kochi-682301.

Respondents

1. M/s AEON Housing Pvt. Ltd.,
Represented by Mr. Agy George ,
14-A, Link Heights, Panampilly Nagar, Kochi.
Having Registered address at Aeon Housing Pvt.Ltd.
103, Thanewala Terrace, 163, R.N.T. Marg, Indore-452001,
Madhya Pradesh.
2. Agy George ,
14-A, Link Heights, Panampilly Nagar,
Kochi - 682036.
3. Rajiv Nahar,
Kantilalji Nahar, 04 Gulmarg colony,
Indore -452018. AEON Housing.



4. Harish Pardasani,
N-24, Anoop Nagar,
Indore- 45201 8, AEON Housing.
5. Neena Agy,
14-A, Link Heights, Panampilly Nagar,
Kochi - 682036.
6. P.V.Antony,
Pazhaveedan House, Pettah,
Poonithura Village,
Kanayannur Taluk,
Ernakulam District, Kochi.
7. P.V.Annamma Antony,
Pazhaveedan House, Pettah,
Poonithura Village,
Kanayannur Taluk,
Emakulam District, Kochi.
8. Aeon Blue Palms Owners Welfare Association &
Charitable Trust, Maradu, Kochi.
Represented by Mr. Philip, Skyline River Dale,
Daffodil, Pettah, Kochi.

ORDER

1. The Complainant is an allottee of the project named 'AEON BLUE PALM' located at Maradu, Ernakulam. The relief sought by the Complainant is refund of the amount paid by him to the Respondent along with interest. The Complainant had



entered into an agreement for sale dated 02/02/2012 with the promoter/ 1st Respondent and landowners/ 6th & 7th Respondents for the purchase of 2.41 undivided share of land having an extent of 43.656 cents and the right to construct Apartment No.6C to be constructed on the 6th floor having a super built-up area of 1355 sq. fts. along with a car park bearing No.6C and the right to enjoy the common areas and common facilities and benefits thereon. The complainant paid the total amount of Rs.45,75,982/- which included Rs 1,52,400/- paid to the 5th Respondent on 05/07/2016 and Rs. 1,18,124/- to the 8th respondent/ Association in March 2020. There is another agreement for the takeover and completion of the apartment project dated 22/03/2019 between the land owners/6th & 7th Respondent and Neena Agy as the builder and the promoter /1st Respondent and Blue Palm Owners Welfare and Charitable Association represented by the 13 buyers. The Complainant had further submitted that he had paid Rs 42,05,458 by 13/06/2013 but the project was delayed. The reason for delay as understood by the complainant was lack of no objection certificate from Fire and Safety Department, CRZ, Pollution Control Board etc as the builder built a 9th floor, as against the clearances that were granted for the project for ground plus 08 floors only. The Aeon Housing Pvt. Ltd. as a company is wound up and no funding was possible to be given towards the project as the Respondents terminated the joint venture agreement without any intimation to the buyers.



2. The relief sought by the Complainant is refund of the amount paid by him along with 13% interest.

3. The 2nd and 5th Respondents submitted written submission and submitted that the company had become defunct in the year 2017 and due to its inability to complete the construction, the project was handed over to the 8th Respondent with the consent of the 14 buyers. The company has been struck off from the Register of Companies under sec 248 of the Companies Act and the same was published in the official Gazette under sub-section 5 thereof. The 2nd Respondent stands disqualified u/s 164 of the Companies Act. The Respondents approached the Appellate Tribunal against the order issued by the Authority in which the company and its disqualified directors were directed to register the project. The Respondents submitted that law does not recognise any Authority in the directors of a defunct company to act for or on behalf of a defunct company. The Appellate Tribunal has appreciated the said aspect and therefore proceeded to hold in paragraph 5 of its order that such direction cannot be passed against defunct company. Therefore, a direction to register the project can lie only against the land owners and the 8th respondent association. The said association through its 13 buyers entered into an agreement dated 22/03/2018 for take over and completion of the apartment project from the company. The Complainant is not only one of the members of the



said association, but also holds the office of the executive member of the said association. As per the agreement, with effect from 22.03.2018, the 2nd and 5th Respondent stood exonerated of all responsibilities for the completion of the project and it was unanimously decided by the buyers association. Neither the company nor the 2nd and 5th Respondent had any obligations to complete the said project as alleged by the Complainant. The acceptance by the Complainant of the agreement of takeover is clear from the fact that the Complainant himself has affected balance payment due under the deed of allotment to the buyers association for completion of flat 6C allotted to him. The Complainant had paid Rs. 1,81,124/- as balance payment for completing the Construction.

4. It was submitted that the Complainant is hit by doctrine of estoppel. The Complainant was a member of the association of the project which was handed over by the erstwhile promoters. Having acted under the agreement, the Complainant cannot be heard to conduct that the transfer is illegal, for his claim would be hit by the estoppel as recognized in law. It was also submitted that the liability of every director of a company dissolved under sec. 248 of the Companies Act, 2013 shall continue and may be enforced as if the company had not been dissolved. The said liability cannot extend to registration of a project by a disqualified director of a defunct company as the law



does not recognize a disqualified director to perform any of the functions of a company whether active or defunct. Without prejudice the financial liability of a director of a defunct company cannot be determined independent of the facts of the case. In the present case the Complainant himself accepted the 8th Respondent association as its new promoter, advanced further amounts to the said association and agreed to the extended time for completion of project by the association. If the promoter(association) fails to complete the project within the extended period after the balance amounts from the Complainant, the Complainant has to raise claim only against the new promoter and not against the defunct company or the disqualified directors.

5. The Respondents 3 & 4 filed counter affidavit and submitted that the agreement for taking over and completion of Apartment project was executed between the respondent No. 2, 5 & land owners, respondents No. 6&7, without knowledge of the Respondent no. 3& 4. The Respondents were not a party to the said agreement. The Complainant has approached with unclean hands. In fact, the Complainant is a party to the agreement for take over and completion of Apartment Project entered into between the Owners Association, the 2nd Respondent, 5th Respondent and the Respondent 6&7. The Respondent no. 3&4 are not a party to the same nor is the same within their knowledge. No communication was brought on record to show that the



company or the respondents 3 & 4 in any capacity had permitted the 2nd Respondent along with his wife that the 5th Respondent in form a new company and enter into any terms with the Complainant. In fact, no such permission was given. The Respondents 6 & 7 along with the 2nd Respondent and his wife that is the 5th Respondent had joined hands and made illegal gains throwing out the 1st Respondent company and the Respondents 3&4. The Respondent 6 & 7, land lord delayed the project and informed the Respondent no. 3&4 that certain new modifications and changes are been made to the initial lay out plan of on the back side flats from 2 bed room to 3 bedroom. All the changes were proposed by the respondents 6&7 and it was made to believe that the project is stalled since fresh sanctions with the help of the newly induced developer. The Respondent No. 3& 4 are not the partners of the 1st Respondent company as has been stated by the Complainant in para 1 of his Complaint. The 1st Respondent company in question has already been struck off from the register by the registrar of companies. The 1st Respondent company has been declared defunct and there is no activity undertaken in the said company during the course of business. The payment in part made by the Complainant has been received by the welfare association who in turn had to deposit the said payment in the account of the association. Certain payments as per averments of the complainant himself has been received at the time of the said agreement in force and the Complainant being one of the



beneficiary is himself accountable and answerable to the said receipts, which otherwise is not in the knowledge of the Respondents 3& 4.

6. During the hearing on 28/03/202, the counsel for the Complainants, Respondents 2,5,8, and R3 & R4 were represented. During the hearing it was found that the said project is not registered with the Authority under section 3 of the Real Estate (Regulation & Development Act) 2016. The Complainant had produced copy of the agreement executed by the 1st respondent as promoter. It was submitted that the occupancy certificate for the project was not received before 01/05/2017.

7. Section 3 of the Act stipulates that *(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act: Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act: and the provisions of this Act or the rules and regulations made there under, shall apply to such projects from that stage of registration. Section 59 of the Act states that (1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten per cent. of*



the estimated cost of the real estate project as determined by the Authority.

(2) If any promoter does not comply with the orders, decisions or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term that may extend up to three years or with fine which may extend up to a further ten percent of the estimated cost of the real estate project, or with both. As per Rule 3(2) of the Kerala Real Estate (Regulation and Development) Rules, 2018, "In the case of ongoing projects on the commencement of the section 3 of the Act (01/05/2017) and for which the Occupancy certificate has not been issued, the promoter shall make an application in the form 'A1' to the Authority for registration of the said Project". An interim order was passed on the same day directing the 1st Respondent to register the project within 15 days from the date of receipt of the order to ensure compliance of the above.

8. During the next hearing on 24/05/2022 it was found that the application for registration of the project under section 3 was not submitted by the 1st Respondent. It was at this point the counsels appearing for the Complainant and the Respondents submitted that the 1st Respondent Company has been struck off from the register of Registrar of Companies. Though no documents were produced in this regard, in the interest of the allottees of the project and to ensure registration of the project under section 3 of the Act, 2016 another interim order was



issued directing Respondents 1 to 7 to register the project within 15 days from the date of receipt of this order.

9. On 27/06/2022 the Counsel for the Respondents 2, 6 & 7 sought two weeks' time to register the project with the assistance of Respondent No.8/Association. On 18/07/2022 it was brought to the knowledge of the Authority that the interim order dated 24/05/2022 was under challenge before the Hon'ble Appellate Tribunal by the 5th Respondent. The Hon'ble Appellate Tribunal vide its order dated 15/12/2022 in REFA No.50/22 allowed the appeal and directed this Authority to conduct a proper and legal enquiry for a finding afresh as to whether the project in question is a registrable one, whether the promoter is defunct or not, whether the promoter can be directed to register the project, and also whether the land owners have any liability to register the project as co-promoters.

10. In view of the above, the case was posted to 18/1/2023 for hearing and an interim order was issued on 13/02/2023, directing respondents 2 to 7 to register the project under section 3 of the Act, 2016 within 15 days on receipt of the order. Complaint was finally heard on 22/02/2023 and taken for orders. The documents produced by the Complainants were marked as **Exhibit A1 to A6** and the document produced by the Respondent marked as **Exhibit B1**. **Exhibit A1** is the agreement for sale dated 02.02.2012 executed between the Complainant, the



1st respondent/promoter, 6th and 7th respondents/landowners/ for the purchase of 2.41% of undivided share over the land having an extent of 43.656 cents and the right to construct Apartment No.6C to be constructed on the 6th floor having a super built-up area of 125.92 sq. mts. along with a car park bearing No.6C and the right to enjoy the common areas and common facilities and benefits thereon. **Exhibit A2** is another agreement for the takeover and completion of the apartment project dated 22/03/2018 between the 6th & 7th Respondent / land owners, 5th Respondent/Neena Agy as the builder, 1st Respondent / Promoter and the 8th Respondent Association represented by 13 buyers. In Exbt.A2 it is stated that the 6th & 7th Respondents / land owners had entered into a joint venture agreement on 17/08/2009 with the 1st Respondent represented by the 2nd Respondent, to build and sell the project named as 'Aeon Blue Palm' on the land having a total extent of 43.656 cents. It is further stated that the 1st Respondent was not able to complete the project within the 30 months from the date of agreement nor after the extended time allowed till December 2014. According to the above agreement the 6th and 7th Respondents / land lords had entered into a joint venture agreement with the 5th Respondent as the new builder to complete the project. It is also stated that the 5th Respondent had taken over the project with all the liabilities of the 1st Respondent and a promise to complete the project within a specified time, in which she could not complete the project. In the terms and



conditions attached to the agreement it is stated that the 8th Respondent is willing to take over the project as the 5th Respondent had expressed inability to complete the project. The 6th & 7th Respondents had expressed their approvals in allowing the 8th Respondent to take over the project.

11. Under section 15 of the Act, 2016 the promoter can transfer or assign majority rights and liabilities in respect of a real estate project to a third party only after obtaining prior written consent from 2/3rd allottees and the approval of the Authority. So the take over agreement (Exbt.A2) cannot be considered as a valid transfer of a real estate project, under section 15, since the Act 2016 was in force when the takeover agreement was executed. IA.No.27/2023 was filed before this Authority on 27/01/2023 along with document dated 24/11/2022 issued under the RTI Act by the public information officer, Office of the Registrar of Companies, Madhya Pradesh, Gwalior, revealing the fact that the company has been struck off from the register of registrar of companies on 09/06/2017 and is marked as **Exbt.B1**. The above document was produced before the appellate Tribunal during the hearing of the Appeal REFA No.50/2022. The company has been struck off from the register of registrar of companies on 09/06/2017 and the second Respondent has signed on behalf of the 1st Respondent on 22/03/2018 in the take over agreement (Exbt.A2). When a take over agreement has been signed and



claimed to be a valid document after the company has been struck off from the register of registrar of Companies, the directors are now trying to escape from their liability to register the project and complete the works on the contention that the company has been struck off.

12. All the above documents confirms the fact that the project is an ongoing project, registrable under section 3 of the Act, 2016. The association of allottees shall have the first right or refusal for carrying out the remaining development works under Section 8, upon the registration lapse or on revocation of the registration under the Act, 2016. As per the Government of Kerala Circular No: LSGD-IB1/38/2020-LSGD dated 18/12/2021, of the Deputy Secretary to the Director of Panchayath, Director of Urban Affairs, to all local body institutions through Director of Panchayat, Occupancy Certificate to Real Estate projects shall be issued only on production of Registration Certificate from the K-RERA. It is very important that the project is registered to ensure that the project is completed in the interest of the allottees, and Occupancy Certificate, obtained for the real estate project.

13. From Exbt.A1 it can be seen that the 1st Respondent is the promoter along with land owners / 6th & 7th Respondents who are party to the agreement for sale. Through



the Exbt.A1 agreement the 6th & 7th respondents / land owners / Vendor had assured the Complainant / Allottee / Purchaser that the property is free of all encumbrances and they are the absolute, undisputed owners in possession and enjoyment of the property in which the apartments was to be constructed. It was further stated in the Exbt.A1 agreement that the 6th & 7th Respondents had agreed to sell and relaying on their assurances the Complainant had agreed to purchase the scheduled property with rights and improvements therein completely free from encumbrances for a total sale consideration of Rs.35,37,500/- In the schedule attached to the agreement the description of the property shows that 2.41 % undivided share of land over the property together with the right to construct apartment No.6C to be constructed on the 6th floor having a super built up area of 125.92 sq. mts. along with a car park No.6C and right to enjoy the common areas and common facilities thereon was offered for sale. It is also stated that the amount of Rs.35,37,500/- was to be paid to the 1st Respondent as per the terms of the agreement dated 17/08/2009 referred to in Exhibit A2. This agreement was entered into between the 1st Respondent represented by the 2nd Respondent, and the 6th and 7th respondent/ Land owners, to build and sell the project named as 'Aeon Blue Palm' on the land having a total extent of 43.656 cents between them. The 6th & 7th Respondents had agreed to execute in favour of the allottee a sale deed conveying the said property on completion of the payment /



consideration subject to conditions in the agreement. Promoter is defined as *“a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees”*. The 6th and 7th Respondents had caused the construction of the apartments and cannot escape the liability of completing the project as envisaged in the agreement to which they were parties. The allottee had purchased the apartment based on the assurances of the first 6th and 7th Respondents.

14. It is admitted in the reply affidavit filed by the 2nd Respondent that the Respondents 2 & 4 are former directors of the 1st Respondent Company. From the company Master data on the MCA portal, it is to be concluded that the 2nd 3rd and 4th Respondents are directors of the company and cannot escape the liability of the promoter company to register the project. The Respondent No.5 is the wife of the 2nd Respondent and is referred to as the builder in Exbt.A2 take over agreement. Under section 248 (7) of the Companies Act, 2013 *“The liability if any of every director , manager or other officer who was exercising any power or management and of every member of the company dissolved under sub section 5 shall continue and may be enforced as if the company had not been dissolved”*. Under section 248 (5) *“the*



registrar may unless cause to the contrary is shown by the company strike off its name from the registrar of companies and shall publish notice thereof in the official gazette and on the publication in the official gazette of this notice the company shall stand dissolve”.

15. As per section 69(1) of the Act, 2016 *Where an Offence under this Act has been committed by a company, every person who, at the time, the offence was committed was in charge of, or was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly”*.

16. The Hon’ble High Court in MSA No.4 of 21 dated 14/07/2022 had observed *“The statement of objects and reasons of the Act also points that the Act has been established for regulation and promotion of real estate sector and to ensure sale of plot, apartment building etc in an efficient and transparent manner and to protect the interest of the consumers in real estate sector. It is to ensure greater accountability towards the customers consumers and to reduce frauds and delays, the Act has been promulgated. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism.*



The Real Estate (Regulation & Development) Act, 2016 is a beneficial legislation intending to safeguard the interest of the consumers as well as promoters by imposing certain responsibilities on both. So, bearing in mind the great objectives with which the Act has been promulgated if at all it could not redress the grievance of consumers like the appellant the very purpose of the Act would become otiose”.

17. Considering the above the Respondents 2 to 7 are liable to register the project under section 3 of the Act, 2016 and just because the 1st Respondent company has been struck off from the register of registrar of companies the allottees cannot be considered as to be having no other alternative, after passing of the Real Estate Regulation and Development Act, 2016 by the Parliament of India. Though direction has been issued to respondent 2 to 7 to register the project the respondents have not registered the project and are liable to pay penalty for contravening the direction under section 63 of the Act. Promoter who has contravened the provisions of Section 3, is punishable under Section 59 and this Authority is initiating proceedings in this direction. However the respondents cannot escape their liabilities under the Act, 2016 by refusing to register the project.

18. It is clear from the agreements executed that the Respondents have promised the Complainants that they will complete the construction of the apartment within 30 months



from the date of agreement. Thus the Respondents have to complete the construction by December 2014 including the extension of time allowed. The Respondents have not produced any documents to substantiate their arguments that the Complainant is a chronic defaulter and they have completed the construction on time. The project is still incomplete and is abandoned by the promoters. The Complainant is eligible to withdraw from the project and claim refund of the amount paid by him along with interest, under Section 18 of the Act, 2016.

19. The details of the payment made by the Complainant to the 1st respondent as per Exbt.A2 series is as follows:-

Payment Schedule

<u>Date</u>	<u>Amount</u>
05/02/2012	Rs.7,07,500.00
06/02/2012	Rs.1,62,500.00
06/02/2012	Rs.4,00,000.00
07/02/2012	Rs.30,000.00
08/02/2013	Rs.18,67,132.00
05/03/2013	Rs.3,00,000.00
08/03/2013	Rs.3,38,326.00
13/06/2013	Rs.3,00,000.00
Total	Rs 41,05,458.00



20. 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.

21. 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 the Act, 2016.

22. The Complainant herein is entitled to get the refund of the amount paid as per the payment schedule stated above along with interest on each payment from the date of payment to the date of realisation under Section 18 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 complainant limited his claim to 13% interest. Hence it is found that the Respondent's 2 to 7 are jointly and severally liable to refund to the complainant Rs. 41,05,458.00/- along with 13 % simple interest on each amount paid as per the



payment schedule from the date of receipt of payment by the Respondents, till realisation.

23. Based on the above facts and findings, invoking Section 37 of the Act, this Authority hereby passes the following order: -

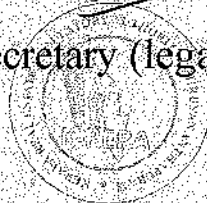
1. The Respondents 2 to 7 shall refund the amount of Rs.41,05,458/- to the Complainant with simple interest @ 13% per annum from the date of each payment, as per the payment schedule till the date of realization.

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 above Respondents and their 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)



APPENDIX

Documents submitted by the Complainants

- Exhibit A1- True copy of the Agreement dated 02/02/2021.
- Exhibit A2- True copy of the Agreement dated 22/03/2018.
- Exhibit A3- True copy of the Statement of Payments.
- Exhibit A4- True copy of the receipts.
- Exhibit A5- True copy of affidavit by Complainant in 109/2020.
- Exhibit A6- True copy of the counter affidavit.
- Exhibit A7- True copy of the letter.
- Exhibit A8- True copy of instruction in RERA 43/2017

Documents submitted by the Respondents

- Exhibit B1- True copy of the reply to RTI application along with the Gazette Notification dated 24.11.2022.

