



KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint No.225/2022

Present: Sri. M.P Mathews, Member

Dated 15th February, 2023.

Complainant

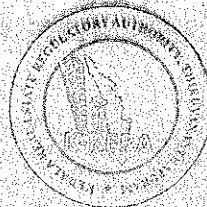
Biju Viswanath,
Rajbhavan, Kaviyoor P.O,
Thiruvalla, Pathanamthitta – 689 582.

(By Adv.Sukesh Roy T)

Respondents

1. AVS Serene Builders,
AVS Serene Heights, Thiruvalla Bus stop,
Kuttapuzha Junction, Thiruvalla -689 103.
2. Abraham Joseph,
AVS Serene Heights, Thiruvalla Bus stop,
Kuttapuzha Junction, Thiruvalla -689 103.
3. Shini Abraham,
AVS Serene Heights, Thiruvalla Bus stop,
Kuttapuzha Junction, Thiruvalla -689 103.

(By Adv.P.K.Revi)



The above Complaint came up for virtual hearing today. Counsel for the Complainant, Counsel for the Respondents and a representative of the Panchayath attended the hearing.

ORDER

1. The Complainant is an Allottee of project named 'A V S Serene River View' located at Kaviyoor village, developed by the Respondents. The Respondents have submitted application for registration of the said project on 20/12/2022 under section 3 of the Act, 2016 and the same is under scrutiny.

2. The Respondents have convinced the Complainant about an ongoing project named 'AVS Serene River View' and promised the Complainant and his wife to build and deliver a multi-storeyed apartment. Accordingly the Respondents executed an agreement with the Complainant and his wife on 17/07/2013 for constructing an apartment on mutual trust and goodwill.

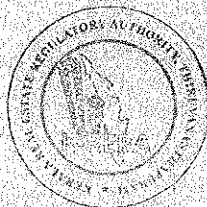
3. The Complainant had given an advance amount of Rs.5,00,000/-. The Respondents had promised and offered the Complainant and his wife to construct an apartment comprising 1192 sq.ft. on the 14th floor as per agreement dated 17/07/2013. Later on 22/03/2014 the Complainant had paid an amount of Rs.2,00,000/-. As per the said agreement the apartment the Respondents promised



to complete and handover the apartment to the Complainant within 24 months from the date of agreement. But neither the construction is completed nor they have not returned the money.

4. The Complainants further submitted that the Respondents are raising untenable excuses for returning the aforesaid money even after repeated reminders by the Complainant. the Respondents 2 & 3 absconded the office and is unable to reach till date. It has been come to the notice of the Complainant that there are several people who has been cheated similarly by the Respondents and the Respondents already started constructing new projects in various places. From November 2020, the Complainant is in contact with the manager of the builders named Resmi and she promised to return the said amount as early as possible. The company is now functioning under the name AVS Serene Heights. The Complainant has filed a complaint before the SHO Thiruvalla regarding this issue on 15/06/2022 (Complaint No.102711/2022) but no action was taken or initiated by the police in connection with this. The Respondents are liable to return the money received from the Complainant with interest @ 12% per annum from the Respondent. Hence this Complaint.

5. The reliefs sought by the Complaint is refund of an amount of Rs.7,00,000/- paid to the Respondents along with



interest at the rate of 12% per annum from the Respondents and their assets.

6. The Respondents 2 & 3 have filed objection to the above Complaint and submitted that the above complainant is not maintainable either in law or on facts. The 1st respondent has not entered into any Agreement with the complainant and received any amount from the complainant. In that sense there exists no privity of contract in between the complainant and the 1st Respondent. The firm that entered into Agreement with the complainant is M/s . AVS Thiruvalla firm and the present 1st respondent is a proprietary concern of the 2nd respondent and hence the 3rd respondent has no relation with the 1st respondent entity. Thus the complaint itself is not maintainable.

7. The Respondents further submitted that the complaint is filed without arraying the real party to the agreement M/s. AVS Thiruvalla suffers from the defect of non-joinder of necessary party. The project AVS Serene River View is a multi storied residential apartment project conceived by M/s. AVS Thiruvalla, a duly registered partnership firm and the construction is completed before the spread of covid 19 and is ready for occupation.



8. It was further submitted that the complainant is the person who intentionally withdrawn from performing his part of agreement. Clause 3 of the agreement stipulates timely payment of instalments and as per that Clause the Complainant was liable to make payment of the 2nd instalment of Rs.4,00,000/- only when the structural work of the 8th floor completed. By September 2014 itself the respondents 2 and 3 who are the partners of M/s. AVS Thiruvalla has completed the structural work of 8th floor and the complainant has persistently demanded to make payment of the 2nd installment. Unfortunately after repeated requests and reminders the complainant was able to pay only Rs.2,00,000/- in place of Rs.4,00,000/- and thereafter the complainant has not turned up. He never contacted the respondents 2 and 3, he never made payment of the remaining instalments. In fact the cash crunched complainant given up his desire to purchase the flat and thus he abandoned his advance amount of Rs.7,00,000/-. The complainant who has abandoned his advance amount, who has given up his desire to purchase flat and who never enquired about the apartment project and its progress is now approached this hon'ble authority to realize his time barred advance amount through the help of this hon'ble authority.

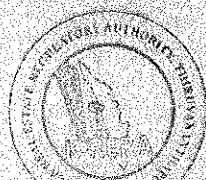
9. Further Clause 6 of the agreement produced by the complainant specifically spelt out the fate and consequences of



non-payment of installments as per schedule of Payment. By virtue of this clause the complainant who intentionally defaulted to make 3 consecutive payments from 3rd installment onwards lost his entire right, which includes the right to claim refund of the entire advance amount. In fact, by virtue of this clause the complainant is entitled only to have Rs.6,30,000/- and he doesn't have any right to claim either the entire amount or interest for the advance amount.

10. The Respondents further submitted that the time bound completion of the project primarily depends upon the prompt and proper payment of instalments by the flat owners. The delay in completion of the project was solely due to the delayed payment of instalments by the individuals flat owners including the Complainant. The Complainant who made wild and unsustainable allegations against the Respondents 2 & 3 intentionally keeps silent regarding his absence for a long period from 22/03/2014 to November 2020 and during this long period the Complainant has not turned up either to convince about the progress of the project or to make payment of further instalments. The Complainant has not visited the office of the Respondents 2 & 3 and he never contacted their respective phone numbers as well.

11. The Respondents 2 & 3 further submitted that they are ready and willing to sell the flat to the Complainant at the



agreed price and he is most welcoming to the apartment to inspect the flat, its stage of construction, the common amenities and facilities etc. since the Respondents 2 & 3 are ready and willing to sell the Flat No.14 E to the Complainant at the agreed cost itself, he is not entitled to get refund the amount as demanded.

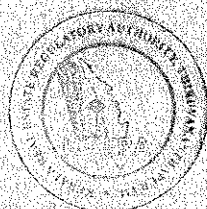
12. The Complainant had filed reply statement to the objection filed by the Respondents and submitted that the statement of the Respondents that there is no privity of contract between the complainant and the first respondent is not true. It is true that Respondents No.2 and 3 have entered into an agreement with the complainant by executing an agreement for construction of apartment on 17/7/2013 as M/s AVS, Thiruvalla. But on records, all the payments were received by the 2nd and 3rd respondent on behalf of AVS SERENE BUILDERS under the project name SERENE RIVERVIEW, Thiruvalla. The Complainants have produced the true copies of the two instalment payment receipts (Rs 7 lakhs & Rs 2 lakhs) which was signed by Respondent No.2 for and on behalf of AVS Thiruvalla. This clearly indicates the existence of a contract between the complainant and respondents 1, 2 & 3 as well as an undertaking to construct the aforementioned apartment in accordance to the agreement. That is the reason why M/s AVS SERENE BUILDERS was included as 1st respondent in this



complaint along with Respondents 2 and 3. Otherwise, the complainant doesn't find any logic for providing him a receipt signed by Respondent No.2 for AVS Builders under and on behalf of AVS SERENE BUILDERS.

13. The Complainant further submitted that as per the payment schedule mentioned in the agreement, the complainant is liable to pay second instalment of Rs 4 lakhs only after the completion of the 8th floor. But the respondents have failed to complete the aforementioned 8th floor on time and moreover the respondents had only demanded Rs.2 lakhs from the complainant as second instalment because of their failure of non completion. The averments regarding repeated requests and reminders to the complainant for remaining instalments is not true. The complainant has approached the respondents several times by visiting the respondent's office and over phone for the completion of the project or to refund the amount received by the respondents.

14. As per clause 5 the respondents assured the complainant that they will construct and handover the apartment within a time span of 24 months from the date of the original agreement and possession will be handed over to the complainant. But the respondents violated the terms and conditions agreed with the complainant regarding the construction and completion of the



aforesaid apartments. The complainant has never received any notice or intimation from the respondents regarding the instalments payable or about the completion of the project till date and moreover respondents failed to produce any documents or records in support of this. The complainant has never defaulted to perform any duties or responsibilities from his part with regard to the agreement executed with the respondents. Balance of convenience is in favour of the complainant, since he suffered huge loss and untold hardships due to the non-performance and default of the respondents where the loss cannot be mitigated.

15. 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 A4**. No documents were produced from the part of the Respondents.

16. **Exbt.A1** is the copy of agreement for construction entered into between the 1st Respondent represented by its managing partners, the 1st & 2nd Respondents and the Complainant. As per the said agreement the 1st Respondent /builder agreed to construct an Apartment No.14th E in the 14th floor of the said project, having super built up area of 1192 sq. ft, for a total



consideration of Rs.31,00,000/-. It was also stated in the agreement that the 1st Respondent shall complete the Construction of the apartment as per the specification attached and finish the work within 24 months from the date of the agreement and possession will be handed over on completion subject to payment of the entire amount by the Complainant.

17. **Exbt.A2** series is the copy of payment receipts issued by the Respondents. It is clear from Exbt.A2 that the Complainant had paid an amount of Rs.7,00,000/- to the Respondents for the purpose of constructing an apartment No.14E in the said project.

18. **Exbt.A3** is the copy of compliant filed before Thiruvalla Police Station dated 12/06/2022 stating that the Respondents have not constructed the said apartment till now as per the construction agreement dated 17/07/2013 and thereby cheated the Complainants.

19. The Authority vide interim order dated 27/10/2022 directed the "Respondents to register the real estate project named 'A V S Serene River View' with the Authority under section 3 of the Act, 2016 or explain the reasons for not registering the project within 15 days from the date of receipt of this order".



20. In compliance of the said order dated 27/10/2022, the Respondents have submitted application for registration and submitted fee for the same on 20/12/2022 and the same is under scrutiny.

21. The Authority vide notice dated 01/02/2023 directed the Secretary, Kaviyoor Grama Panchayath to file a report regarding the present status of the above project within 15 days. In compliance of the said direction the Secretary has filed a report dated 10/02/2023 stating that “ permit dated 09/09/2016 was issued to the said project from the panchayath and the same was renewed on 27/09/2019. The said report submitted by the Secretary dated 10/02/2023 is marked as Ext.XI. Thereafter the 2nd Respondent has submitted application for issuance of Occupancy Certificate for the project. It was also reported that the Fire NOC and NOC from Pollution control board was not issued to the said project till date.”

22. It is clear from the report submitted by the Secretary, Kaviyoor Grama panchayath that, Occupancy Certificate for the said project is not issued till date. The Respondents have promised the Complainants that they will complete the construction of the apartment within 24 months from the date of agreement ie., 17/07/2013. Thus the Respondents have to complete the construction

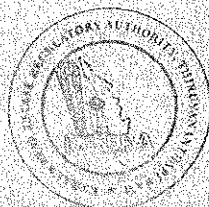


by July 2015 it self. Since occupancy certificate was not issued to the project till date and the Respondents have not produced any documents to substantiate that they have completed the construction on time, the Complainant is eligible to withdraw from the project and claim refund of the amount paid by him along with interest.

23. The details of the payment made to the respondents as per Exbt.A2 series is as follows:-

<u>Date</u>	<u>Amount</u>
17/07/2013	Rs.5,00,000.00
22/03/2014	Rs.2,00,000.00
Total	Rs.7,00,000.00

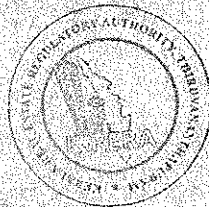
24. Section 18 of the Real Estate (Regulation & Development) Act 2016 stipulates that *“if the promoter fails to complete or is unable to give possession of an apartment, plot or building (a), accordance with the terms of the agreement for sale or duly completed by the date specified therein; or due 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 the Act, 2016.



26. Hence, the Complainant herein is entitled to get the refund of the above-mentioned amount along with interest and the Respondent is liable to refund the amount to the complainant along with the 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 Complainant limited his claim to 12% interest. Hence it is found that the Respondent's 1 to 3 are liable to pay Rs.7,00,000/- along with 12 % simple interest from the date of receipt of payment by the Respondents.

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

1. The Respondents 1 to 3 shall return the amount of **Rs.7,00,000/-** to the Complainant with simple interest @ 12% per annum from the date of each payment, 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)



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

Ext.A1- Copy of agreement for Construction dated 17/07/2013.

Ext.A2 series - Copy of payment receipts.

Ext.A3- Copy of police complaint filed against the Respondents.

Ext.A4 - Copy of WhatsApp communications .

Ext.X1- Copy of report dated 10/02/2023 filed by the Secretary,
Kaviyoor Grama Panchayath.

