KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint No. 243/2021

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

Dated 5th September 2023

Complainant

Jose Titus
46/1419-H, Koikethu House,
Palakkaparambu Lane,
Madappattu Road, Vennala P O,
Ernakulam- 682028
[By Adv. Rajashekaran]

Respondents

1. Thadeus V C
   Executive Director,
   M/s Galaxy Homes Pvt Ltd.
   Vevukatt House,Muttinakkam,
   Varapuzha P O-683513
2. M/s Galaxy Homes Pvt Ltd,
   Registered Office, Rajaji Road,
   Kochi- 680018
   [By Adv. Thomas John]

The Counsel for the Complainant, Adv. Rajashekharan and the counsel for the Respondent, Adv. Thomas John attended the hearing.

ORDER

1. The Complainant is an allottee in the project Galaxy "Cloud Space" developed by the Respondents. The Authority issued an order dated 24/06/2021 in Complaints No. 206/2020, 222/2020, 254/2020 & 46/2021 filed by the allottees of the same project in which it was directed as follows: **(1)** *The Respondents shall complete the works related to essential services, mutation of flats in the name of Complainants, etc. within One month and complete and hand over, the whole project 'Galaxy Cloud Space' 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 30.12.2021*** *without fail. (2) The Association of allottees formed and registered, to monitor the progress of works and make sure that the work is being carried out as per the Work Schedule given in the Exbt. B1 affidavit marked in the above said complaints and it was informed that in case of any default on the part of the Respondent, the Association can approach the Authority seeking further intervention. (3) The Respondents shall complete the executions of*

all sale deeds, if any, related to apartments / common areas of the project within the said time frame. (4) The Respondents shall 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 ***one month*** *from the date of receipt of the order, and (5) the Respondents shall submit before the Authority, the compliance report in the form of an affidavit on or before* ***03-01-2022*** *after serving copies to the Complainants.* It was also specified that in the event of any non-compliance of the order by the Respondents, the Authority shall initiate severe penal actions as provided under Section 63 of the Act. The said Complaints were posted for further hearing separately on adjudication of interest claims filed by each one the Complainants.

2. Thereafter above complaint No. 243/21came along with other new Complaints No. 129/2021, 132/2021, 133/2021 172/21, 203/21, 50/22, 73/22, 96/22 & 153/22 filed by some other allottees in the same project and the Authority, vide orders dated 26/07/2021 & 23/07/2022, had made the aforementioned previous order dated 24/06/2021 applicable, to these Complaints and decided to hear the claims on interest for delay on a later date. Accordingly, the interest claims on the above said Complaints were heard together on 05/09/2023 and decided to pass orders separately in each of these Complaints.

3. The facts of the Complaint is as follows:-The Complainants had booked a proposed flat of the Respondent builder, M/s Galaxy Homes at their project, "Cloud Space" near Info Park, Kakkanad and executed two agreements, with Respondents for the purchase of undivided shares of land of 89.871 cents in Survey No. 359/3 Block 7 in Kakkanad Village, Ernakulam District, and for construction of Apartment No. 1-3 having an extent of built-up area of 1159 Sq. Ft with car parking area in Ground Floor of size 4m x 2.4m, at a total cost of Rs. 34,94,081/-. (inclusive of all statutory charges, taxes and VAT). On the basis of the agreement for purchase of land, the Complainant paid Rs. 1,41,008/-. Thereafter, the Complainant had been paying the instalment amounts to the Respondents in a prompt and regular manner as per the schedule in the construction agreement. Last payment of Rs 4,79,733/-, was made vide Cheque No. 000617 x 083137 which were acknowledged by the Respondent. The Respondent served a confirmation in this regard. As per the A1 construction agreement, the project was to be completed in all respects on or before 30.06.2016 and possession was to be handed over within 180 days. But, the progress in the construction of the flat was very disappointing from the beginning of the year 2016 which dragged on a dead slow pace. Thereafter, the builder showed a totally negligent attitude towards completion and failed to complete the flat within the promised and agreed time, in contravention to the Act. The Complainant's repeated follow ups with Respondents

were in vain. The Complainant booked the flat out of his ardent and passionate desire to have a comfortable shelter for him and family at the later stages of his life. He spent all his hard-earned money for this flat as a long-cherished dream, which was shattered by arbitrary and objectionable actions of the Respondent. The Respondents' actions are blatant violations and in contravention of Sec. 11,13 & 17 of the Act.

4. The relief sought by the Complainant is for direction to the Respondents to pay Interest for delay in handing over of flat at the rate of 18%, for the amounts paid till actual handing over and realization of the same is to be considered herewith.The Complainant had produced along with the Complaint, copies of the agreement for construction, calculation statement for interest claim, Final bill given by the Respondent to the Complainant, and additionally, the Complainant has produced the copies of the payment receipts and the bank statement.

5. The Respondents had filed statement of objection to the Complaint and submitted that the Complaint is not maintainable under law as admittedly the Complainants are claiming reliefs based on as agreement executed on 29.04.2014. The project was formulated by the Respondents in 36.39 Ares of land situated at Ernakulam 140 apartments. The agreement for sale and agreement for construction were executed on 29.04.2014 stipulating the conditions including the payment schedule. Clause

4 of the Agreement for Construction executed between the Complainants and the Respondents on 29.04.2014 is as follows- *"The First party shall construct the apartment as per the specifications attached thereto and try the utmost possible to finish the work on or before 30.06.2016 provided the entire amount due to the First Party from the Second Party including statutory charges has been paid by the Second Party. Possession will be handed over within 180 days from the date of paying the entire consideration including statutory charges"*. The date of handing over of possession has not become due since admittedly, the Complainants have not paid the entire consideration including statutory charges as agreed by the parties and the amount as per the final bill was only paid on 11/09/2021 and the possession was handed over accordingly. The Respondents produced the occupancy certificate dated 27/05/2020 and 27/01/2021. The Respondents also submitted that the claim for interest calculation was against the settlement terms and as per the agreement, the completion of construction is subject to the payment of entire amounts due. According to the Respondents, the project was completed in spite of the fact that the Complainant has not paid the entire amounts agreed to be paid as per the construction agreement, no cause of action for filing the above Complaint has arisen.

6. It was further submitted that Article 20(1) of the constitution of India stipulated that no person can be prosecuted and punished for an Act which was not made an offence at the time

of its commission and the reliefs sought for in the above Complaint by the applicants are in the nature of a penalty which cannot be granted in view of said constitutional protection. The penal provision as above could be invoked only for agreements executed after the commencement of the RERA Act. It was also submitted that the Act came into force in the State of Kerala vide Notification No. G.O (P) No. 65/2019/LSGD dated 05/12/2019. Therefore, the provisions of the Act are not having any application to the facts and circumstances of the case. The Respondents submitted that there was a huge delay from the part of the Complainant in remitting the instalments as well as the balance payments as agreed. The interest calculation submitted by the Complainant is not correct. The Complainant has no right to claim interest for the amounts paid by Complainant and he is liable to pay the interest for delay in remitting instalments and the balance amount. Hence the Respondents prayed to dismiss the Complaint.

7. 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 04/06/2022. On perusal of the web page concerned, the Respondents have uploaded the occupancy certificate and the final fire NOC obtained for the project in question but the Respondents have neither uploaded Form-6 showing completion of the project

nor taken any steps for extension of registration as provided under the provisions of the Act 2016 despite notice from the Authority.

8. Heard both parties in detail. The documents produced from the part of the Complainants are marked as Exbts.A1 to A4. The documents produced from the part of the Respondents are marked as Exbts.B1& B2. After hearing the counsels on either side 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:

1) 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?

2) 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?

3) What order as to costs?

9. **Points No. 1&2**: The documents produced by the Complainant are marked as Exhibits A1 to A4. **Exhibit A1** is the construction agreement dated 29.04.2014 executed between the Complainant and the Respondent No. 2 represented by Respondent No. 1 for constructing a three-bedroom apartment having a built-up area of 1159 sq. ft on the Third Floor in the said project for a construction cost of Rs. 34,94,081/- in which the promised date of completion is shown as **30.06.2016 with 180 days grace period**. **Exhibit A2** is the calculation statement. **Exhibit A3** is the final bill given by the Respondents No. 2 to the Complainant. Exhibit A4 series is the copies of the receipts of payment made by the Complainant to the Respondent No. 2 Company. The documents produced by the Respondents were marked as Exhibits B1 to B2. **Exhibit B1(a)** is the copy of the Occupancy Certificate dated 27/05/2020 and the **Exbt. B1(b)** is the copy of Occupancy Certificate dated 27/01/2021 The final bill has been produced by the Respondents which is marked as **Exhibit B2**.

10. The relief sought in the above said Complaint which is considered herewith is only that for a 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.

11. Here, as per the Exbt. A1 agreement, Clause No. 4 is as follows: *"The First party shall construct the apartment as per the specifications attached hereto and try the utmost*

possible to finish the work on or before the 30th day of June, 2016 provided the entire amount due to the First Party from the Second Party including statutory charges has been paid by the Second Party. Possession will be handed over within 180 days from the date of paying the entire consideration including statutory charges." Exhibit. A1 agreement is seen executed by the Complainant and the Respondents on 29-04-2014 as per which the promised date of completion and handing over was on 30-06-2016 with a grace period of 180 days. According to the learned counsel appeared for the Complainant, the Respondents handed over the key to the Complainant and possession of the apartment was taken over only on 10-09-2021 which is admitted by the Respondents. It is admitted by the Respondents that the Occupancy Certificate has been obtained for the project only on 27-01-2021. It is strange that the learned counsel for the Respondents/Promoter produced copies of 2 Occupancy certificates for the same project dated 27-05-2020 and 27-01-2021 and on examination of the said certificates issued by the local authority, it could be seen that the one issued later on 27-01-2021 is the final Occupancy Certificate for the building. In fact, the earlier one dated 27/05/2020 was a partial occupancy certificate for certain area issued on demand of the Promoter, the Secretary of the said local authority/Thrikkakkara Municipality signed on it ought to have shown specifically that it was only a "partial occupancy certificate." Surprisingly, both of these certificates bear the same heading "Occupancy Certificate" and

both certify that "..... *inspected by me and the work executed is in accordance with the permit and the building is now fit for occupation/use.*" However, this Authority made it clarified time and again that as per the whole Scheme of the law, what the provisions concerned of the Act 2016 and Rules 2018 made thereunder envisioned was not a partial or conditional Occupancy Certificate, but it was the final Occupancy Certificate, issued by the Competent Authority, certifying the completion of the project in all respects. As pointed out by several orders of this Authority, even the so-called "final Occupancy Certificates" issued by the local authorities now in accordance with the prevailing Building Rules in the State do not constitute the completion of the whole project as promised to the allottees as per the terms of the agreements executed with them by the Promoter and these can only be considered only as proof of completion of the building/s concerned in accordance with the approval plan. The Respondents/Promoters, being well aware of these facts, ought to have been careful before submitting such misleading contentions and documents.

12. Regarding the issue of maintainability raised by the Respondents/Promoters, it is pertinent to note that the projects that are not completed and have not received the Occupancy Certificate on the date of commencement of the Act come under the fold of the Real Estate (Regulation & Development) Act 2016 and in this case, it is evident that the project has not completed till date, as

promised to the Complainant. In the judgement passed in M/s New tech Promoters & Developers Pvt Ltd. Vs State of U P & Others, the Hon'ble Supreme Court of India confirmed that the Act 2016 is "retroactive" in nature and observed as follows: "*the clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an ongoing project. Thus, it negates the contention of the promoters regarding the contractual terms having an overriding effect over the retrospective applicability of the Act, even on facts of this case*". It is also surprising to note the contention raised by the counsel for the Respondents that 'the relief sought for by the Complainant cannot be granted in view of the constitutional protection given as per Article 20 of the Indian Constitution' because Article 20(1) provides that "*No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor*

be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence" which means that if an act is not an offence at the date of commission, it cannot be an offence at the date subsequent to its commission. Even before the induction of the Act 2016, no promoter was given the right to violate the terms of the agent and cheat the home buyer after grabbing his hard-earned savings. Above all, it is to be noted that Article 20(1) provides constitutional protection to individuals charged against criminal offences prohibited by law but in case of civil liberties or civil proceedings, Art 20(1) shall not be applicable which was made clear by the Hon'ble Apex Court through several judgements. Anyhow, during the final hearing, the Respondent has not opted to press on the issue of maintainability as raised through his pleadings.

13. Here, the learned counsel for the Respondents raised arguments that the completion date was subject to the performance from the part of the complainant but the Complainants failed to perform by making delay in the payments as per the agreement and according to him, the progress of the work will not constitute a breach on the part of the promoter. He also argued that a person raising the claim of breach of contract should have come with clean hands, by performing his part of the agreement, but the complainant herein had violated the terms of the agreement when he failed to pay monthly instalments. Anyhow, on examination of

Exhibit A4 series, it reveals that the Complainant had made most of the payments before the handing over date.

14. With regard to the contentions raised by the Counsel for 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 because 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. Exhibit B1/ occupancy certificate dated 27-01-2021 reveals that the construction according to the approved plan was completed only on 27-05-2020. In view of this, the Respondents have no right to blame the Complainant for any delay/irregularity in payments. It can be seen that the delay in final payments occurred due to the non-completion of work as promised by the Respondent/Promoter. Exhibit B1 occupancy certificate shows that the Respondent could not complete the project as promised. Moreover, the registration web page of the Respondent/Promoter also reveals that the Project in question is not completed even now.

15. Under Section 11(4) of the Act, 2016, the Respondent/Promoter is responsible to obtain the occupancy certificate, from the Competent Authorities and under Section 17 of the Act, 2016 after which, he is duty bound to hand over physical possession to the allottees. 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*". It was observed by the Hon'ble Supreme Court in the judgement of ***Wg. Cdr. Arifur Rahman Khan & others vs Dlf Southern Homes Pvt. Ltd.,*** "*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 the payment of instalments, the Promoter has made use of the investments of the Complainant's hard-earned money for the past years and failed to complete the work and possession was not given as per the terms of the agreement.

16. 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.A1 the Respondents should have handed over possession of the apartment on 30.06.2016, 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 mention here, certain remarkable 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** 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*".

17. In view of the above facts and findings as discussed in the foregoing paras, it has been revealed beyond doubt that the Respondent/Promoter has 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 Section 18(1) of the Act 2016. Points No. 1 & 2 are answered accordingly in favour of the Complainant.

18. In the instant case, the Complainant had remitted **Rs. 36,60,498/-** to the Respondents and the Complainant pray for interest for the delayed months. According to the

complaint, the Complainant has paid an amount of Rs.35,66,498/- before the promised date of completion, i.e. on 30.06.2016. As the Respondent/ Promoter is a defaulter, he is not entitled to get the benefit of the grace period mentioned in the Exhibit A1 agreement. The respective dates of payments and amounts in total are as follows:

Date	Amount in Rs.
14.04.2014	25,000/-
28.04.2014	1,25,000/-
28.04.2014	3,00,000/-
28.04.2014	5,00,000/-
27.05.2014	1008/-
27.05.2014	1,20,490/-
23.07.2014	3,21000/-
23.08.2014	1,07,000/-
04.10.2014	1,07,000/-
11.11.2014	1,07,000/-
03.12.2014	1,07,000/-
02.01.2015	1,07,000/-
06.02.2015	1,07,000/-
05.03.2015	1,07,000/-
30.03.2015	1,07,000/-
05.05.2015	1,07,000/-
05.06.2015	1,07,000/-

29.06.2015	1,07,000/-
31.07.2015	1,07,000/-
25.08.2015	1,07,000/-
28.09.2015	1,07,000/-
07.11.2015	1,07,000/-
01.12.2015	1,07,000/-
28.12.2015	1,07,000/-
27.01.2016	1,07,000/-
26.02.2016	1,07,000/-
03.05.2016	94,000/-
03.06.2016	47,000/-
14.07.2016	47,000/-
17.09.2016	47000/-
Total	**36,60,498/-**

19. 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 1/07/2016, the promised date for handing over till 10/09/2021, the date of handing over possession, on Rs. 35,66,498/- 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 10/09/2021. 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%].

20. 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 are hereby directed as follows:

1) The Respondents shall pay to the Complainant, simple interest @ 16.85% per annum, (a)for Rs. 35,66,498/-, the amount paid before 30/06/2016 (the promised date of completion), for every month from 1/07/2016 till 10/09/2021 and (b) for the amounts paid after 30/06/2016 (the promised date of completion), for every month from the date of each payment as mentioned in the table inserted above till 10/09/2021.

2) If the Respondents fail 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 Complainants are 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 and Rules.

Both parties shall bear their respective costs.

Sd/-
Smt. Preetha P Menon
Member

Sd/-
Sri. P H Kurian
Chairman

/True Copy/Forwarded By/Order/

Secretary (Legal)

APPENDIX

Exhibits on the side of the Complainants

Exhibit A1	: Copy of Agreement for Construction executed by Complainant and Respondent
Exhibit A2	: Calculation Statement
Exhibit A3	: Copy of the Final Bill
Exhibit A4	: Copies of the receipts of payment made by the Complainant.

Exhibits on the side of the Respondents

Exhibit B1	: True Copy of Occupancy Certificates issued by Thrikkakara Municipality
Exhibit B2	: Final Bills