



KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint No.252/2022

Present: Sri. M.P Mathews, Member

Dated 21st February, 2023.

Complainant

Nihaj G Mohammed,
Centre A, Alappatt Heritage Building,
M.G.Road, Ernakulam – 682 035.

(By Adv. Prasannakumar)

Respondents

1. Shamier Marickar,
CEO & Director,
Nest Realities India Pvt.Ltd., &
Marickar Plantations Pvt.Ltd.,
A-10, Kent Paradise, Palarivattom,
Cochin – 682 032.
2. Nest Realities India Pvt.Ltd.,
XIX/346, Stone House, Market Road,
Alwaye, Ernakulam – 683 101,
Represented by its CEO & Director,
Shamier Marickar.
3. Marickar Plantations Pvt.Ltd.,
Oppo. Milma, Edapally,
Ernakulam -682 024.
Represented by its Director,
Shamier Marickar.

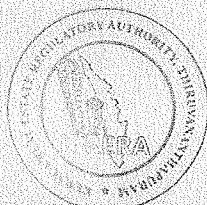


4. Nagoor Jahangir Rawther,
Managing Director,
Nest Realities India Pvt.Ltd.,
Macker Manzil, XX/125 Thynothil Lane,
Alwaye – 683 101.
5. Javad Kuttikaran Hassan,
Director,
Nest Realities India Pvt.Ltd.,
Macker Manzil, XX/125 Thynothil Lane,
Alwaye – 683 101.
6. Althaf Jehangir,
Director,
Nest Realities India Pvt.Ltd.,
Macker Manzil, XX/125 Thynothil Lane,
Alwaye – 683 101.
7. Premin Shamier Marickar,
Director, Marickar Plantations Pvt.Ltd.,
A-10, Kent Paradise, Palarivattom,
Cochin – 682 032.

The above Complaint came up for virtual hearing today. Only counsel for the Complainant Adv.Prasannakumar attended the hearing.

ORDER

1. The Complainant is an allottee of project named 'Nest Orchid Park' located at Vijayapuram Village, Kottayam District developed by the Respondents. The said project is registered with the Authority under section 3 of the Act, (Registration No. K-RERA/PRJ/008/2022).



2. The Complainant was made believe that the said project was 'world class' but available at 'unimaginable, dirt cheap price' and the Complainant was offered a 2 BHK apartment /flat with a super built up area of 1082 sq.ft. for the fixed price of Rs.27,00,000/- by a marketing personal of the 2nd Respondent. Based on the same the Complainant had booked a 2BHK apartment in the said project having super built up area of 1082 sq.ft. on the 3rd floor and paid a token advance of Rs.1,00,000 on 29/02/2012. On 29/02/2012, the Complainant paid a further sum of Rs.5,00,000/- through the bank transfer to the 1st Respondent and executed two agreements with him ie., agreement for sale and agreement for construction. The first one was to sell the Complainant an undivided area of 0.518 cents being the Complainant's proportionate share in the 102.695 cents of land vested with the 3rd Respondent together with right to construct a 2BHK apartment and proportionate share in the common facilities and one covered car parking area for a total consideration of Rs.1,55,200/- which form part of the overall cost of the apartment of Rs.27,00,000/-. The second agreement was for the construction and sale of the said apartment.

3. The sale agreement provided for the completion and delivery of the apartment on or before 31/12/2013, failing which interest @ 10% per annum, compounded at monthly rests was payable by the builder on the amount paid by the Complainant



till 30/09/2013. The sale agreement further provided for interest @ 12% per annum, in case of delay / default in the completion and delivery of the project on agreed time.

4. The Complainant further submitted that the progress of the work on the project was not commensurate with the payments. Thereafter the Complainant availed a housing loan from Axis Bank Ltd., and a sum of Rs.11,88,489/- was paid to the 2nd Respondent on 17/09/2013. Thereafter at different dates further sums aggregating to Rs.8,12,807/- was paid by the Complainant to the 2nd Respondent irrespective of the stage of construction, due to their persistent demands coupled with promises. Thus the payments so far made aggregated to Rs.26,01,296/- which exceeded 96% of cost of flat.

5. It was further submitted by the Complainant that now, more than 8 years and 7 months have elapsed from the promised date of completion. The deadline for construction and all subsequent promises were consistently breached by the builder. The project delays and for that matter non possession of apartment prevented the Complainant from availing possible tax breaks on housing loan. Since December 2015, the Complainant has been incurring an indirect cost of around Rs.16,000/- per month, towards rental accommodation which is the direct consequence of the failure of the Respondents to complete and handover the possession of the apartment to the Complainant as per the agreements.



6. The Complainant further submitted that on 5th June 2018, the Complainant had issued a registered notice to the Respondents, asking them to complete and handover the apartment to the Complainant before the end of June 2018. The Respondents did not respond to the notice, though the notice were delivered to them. On 29/09/2018, the Complainant filed a consumer Complaint against the Respondents with the Kerala State Consumer Redressal Commission alleging deficiency in service and restrictive trade practices and unfair trade practices. The said case bearing No.CC 109/2018 was withdrawn by the Complainant on 17/06/2022 and approached the Authority. The Complainant had so far paid an amount of Rs.26,01,296/- to the Respondents. After having collected more than 96% of the sale consideration, the Respondents are failing miserably on their commitments and contractual obligations. Hence this Complaint.

7. The reliefs sought by the Complainant is to (1)direct the Respondents to refund / return the Complainant an amount of Rs.26,01,296/- paid by him towards sale consideration. (2) direct the Respondents to pay the Complainant a sum of Rs.45,59,112/- towards the interest accumulated till 30/08/2022 and thereafter till fully settled @ 12% per annum at quarterly rets.

8. The Respondents have neither submitted any counter statement nor produced any documents. The 1st Respondent had appeared on 08/12/2022, 14/12/2023 and had submitted that the



matter shall be settled between the parties. However since the matter was not settled the case was posted to 21/02/2023 for orders.

9. The Authority heard the learned counsel for the Complainant 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 **A5**.

10. **Exbt.A1** is the copy of agreement for sale dated 11/05/2013 executed between the Complainant and the 3rd Respondent represented by the 1st Respondent. As per the said agreement the Respondents agreed to sell & the Complainants agreed to purchase 1082/205000 undivided share equivalent to 0.518 cents in the land, together with right to construct a two bedroom apartment No.3-A-3 having super built up area of 1082 sq.ft. in the 3rd floor of the project and proportionate share in the common area and common facilities and one covered car parking area for a total consideration of Rs.1,55,200/-.

11. **Exbt.A2** is the copy of construction agreement dated 11/05/2013 executed between the Complainant and the 2nd Respondent represented by the 1st Respondent. As per the said agreement the Respondents agreed to construct a two bedroom apartment No.3-A-3 having super built up area of 1082 sq.ft. in the 3rd floor of the project for a total consideration of Rs.25,44,800/-.



Thus the Complainant had to pay a total amount of Rs.27,00,000/- to the Respondents. It was also stated in the agreement that the Respondent shall complete the said construction on or before 30/09/2013 with a grace period of 3 months.

12. **Exbt.A3** is the copy of minutes of the meeting conducted by the Respondents with clients including the Complainant. In the said meeting the Respondents assured that around 35/40 apartments will be ready for handover by 30/12/2016.

13. **Exbt.A4** is the copy of lawyers' notice dated 31/05/2018 issued by the Complainant to the Respondents demanding completion of the construction of complainant's apartment and handover its possession before the end of June 2018, with all agreed infrastructure , facilities, amenities and comforts, including the completion certificate and occupancy certificate along with costs and damages.

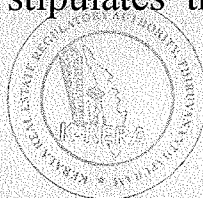
14. **Exbt.A5** is the copy of payment summery dated 19/10/2017 issued by the Respondents. As per Exbt.A5 the Respondents have received an amount of Rs.26,01,296/- from the Complainant. The details of the payment made to the respondents is as follows:-



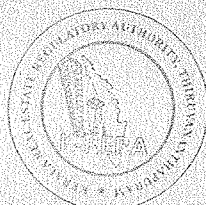
<u>Date</u>	<u>Amount</u>
29/02/2012	Rs.1,00,000.00
13/05/2013	Rs.5,00,000.00
17/09/2013	Rs.11,88,489.00
22/11/2013	Rs.1,62,807.00
24/02/2014	Rs.1,00,000.00
28/10/2014	Rs.1,00,000.00
06/08/2015	Rs.1,00,000.00
25/09/2015	Rs.1,00,000.00
13/11/2015	Rs.2,50,000.00
Total	Rs.26,01,296.00

15. As per Exbt.A3, A4 & the website maintained by the Authority it is clear that the Respondent have not completed the construction of the apartment till 2018 even though the promised date of completion was 30/09/2013 as per Ext.A2. The said project is registered with the Authority under section 3 of the Act, 2016 and a registration certificate was also issued and is valid up to 30/09/2022. It is clear from the website of the Authority that the project is not completed and no occupancy certificate was issued to the said project till date. Hence the Complainant is entitled to withdraw from the project and to claim refund of the amount paid by him with interest as per section 18 of the Act, 2016.

16. 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.

17. 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.

18. As per the master data available on the website of the ministry of corporate affairs the 1st, 4th & 5th Respondents are the directors of the 2nd Respondent company and 7th Respondent is the director the 3rd Respondent company. Hence, all the Respondents except 6th Respondent are jointly and severally 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, (herein after referred as 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 all the Respondent's except 6th Respondent is liable to refund an amount of Rs.26,01,296/- to the Complainants along with 12 % simple interest from the date of receipt of payment.



19. 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 5 and 7 shall return the amount of **Rs.26,01,296/-** 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 sale.

Ext.A2- Copy of agreement for Construction.

Ext.A3- Copy of minutes of meeting dated 28/10/2016.

Ext.A4 - Copy of lawyer's notice dated 31/05/2018 issued by the
Complainant.

Ext.A5- Copy of payment summary dated 19/10/2017 issued by the
Respondents.

