



KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM

Complaints No: 254/2021, 255/2021, 257/2021 & 259/2021

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

Dated 1st day of July 2022

(1) Complaint No. 254/2021

Complainants

1. Manu Krishnan
Sreevalsam, 31/992-A,
Panorama Enclave Lane-2,
Vytilla, Cochin, Ernakulam
2. Smriti M.Nair
Sreevalsam, 31/992-A,
Panorama Enclave Lane-2,
Vytilla, Cochin, Ernakulam



Respondents

1. Jain Housing & Construction Ltd represented by it's
Managing Director Sandeep Mehta
No. 98/99, Habibullah Road, T Nagar, Chennai-600017
2. Sandeep Mehta, Managing Director,
KGEYES Kavery, Flat No. 1, Door No. 1,
1st Floor, Crescent Street, ABM Avenue, R A Puram, Chennai-600028

(2) Complaint No. 255/2021**Complainants**

1. Dennis A.V,
Flat No. 204, Vigneswara Cedar woods,
Narayana Puram, Bengaluru, Karnataka
2. Preethy Dennis,
Flat No. 204, Vigneswara Cedar woods,
Narayana Puram, Bengaluru, Karnataka

Respondents

1. Jain Housing & Construction Ltd represented by it's
Managing Director Sandeep Mehta
No. 98/99, Habibullah Road, T Nagar, Chennai-600017
2. Sandeep Mehta, Managing Director,
KGEYES Kavery, Flat No. 1, Door No. 1,
1st Floor, Crescent Street, ABM Avenue, R A Puram, Chennai-600028



(3) **Complaint No. 257/2021**

Complainants

1. V.D George,
Raheja Reflection Regent court,
Thakur village, Borivali East P.O,
Mumbai.
2. Tessy George,
Raheja Reflection Regent court,
Thakur village, Borivali East P.O,
Mumbai.

Respondents

1. Jain Housing & Construction Ltd represented by it's
Managing Director Sandeep Mehta
No. 98/99, Habibullah Road, T Nagar, Chennai-600017
2. Sandeep Mehta, Managing Director,
KGEYES Kavery, Flat No. 1, Door No. 1,
1st Floor, Cresnet Street, ABM Avenue, R A Puram, Chennai-600028

(4) **Complaint No. 259/2021**

Complainant

1. Rajesh Venugopal,
32/2482, Neelambari,
BTS Road, Near Changampuzha Park,
Edappally, Ernakulam

Respondents

1. Jain Housing & Construction Ltd represented by it's
Managing Director Sandeep Mehta
No. 98/99, Habibullah Road, T Nagar, Chennai-600017



2. Sandeep Mehta, Managing Director,
KGEYES Kavery, Flat No. 1, Door No. 1,
1st Floor, Crescent Street, ABM Avenue, R A Puram, Chennai-600028

The Counsels appearing for the Complainants Adv. Aysha Abraham and the Counsel for the Respondents Adv. George Cherian appeared for the hearing.

ORDER

1. The above complaints were posted for final hearing on 14/02/2022 along with other connected complaints but the counsel for the Complainants and the Respondents sought time for filing the argument notes. The argument notes were received on 25/03/22 and the said 7 complaints were finally heard on 28/05/2022 and taken for orders. It was decided to pass final orders considering each case separately, as per the request of the Counsel appeared for the Complainants, except the above 4 complaints in which we consider the common facts together and unique facts and findings separately in the following manner.

2. The facts in common in the above complaints are as follows: The Complainants are the allottees in the project named 'Jain Tuffnell Gardens', Kakkanadu, Ernakulam who approached the Respondents intending to purchase apartments from them after seeing their advertisements in which the offer was for apartments in the above-said housing project having 8 blocks, with 152 flats in each block, on 8 acres of property with "State of the art living facilities" and a township with



impeccable design and stylish planning. The Respondent/Builder was willing to help the Complainants for obtaining loan from financial institutions who offered a 10/90 scheme under which the complainants had to pay only 10% upfront and 90% would be disbursed by them. As per the said Scheme, the Respondent/builder will pay the EMIs for the first 36 months and the entire loan will be received by the Builder at the time of construction itself. It is alleged by the Complainants that when some of the buyers in the Project approached the Hon'ble High Court regarding the illegality in construction, the builder produced some documents pertaining to Environmental Clearance (EC) and Fire NOC which showed the entire construction as illegal and unsafe. The Respondent/Builder started construction without clearance and submitted false data for clearance. The EC granted to the first Respondent was invalid as the Respondent has increased his capacity from 1,39,885.78 sq. mt to 1,92,637.80 sqm. and the expansion is not just within an entry but the project breached the threshold limits and entered into a different category altogether. The Basic Tax Receipt of the project land is showed the land as 'nilam'/paddy land and therefore an allottee wrote a complaint to the Agricultural Officer and was forwarded to RDO. When the Respondent/builder submitted before the Hon'ble High Court that the Kerala Municipality & Building Rules were not applicable as he started construction before 2006 on which KMBR was notified to be applicable the Court held that the KMBR is applicable and no vested rights accrue on a builder to build in violation of the Rules. But the Respondent managed to obtain the Fire NOC in violation of law in August 2020 and also obtained an occupancy certificate in October 2020 for Block 4 of the building even though the work was not completed. The Complainants directly and by email communication, contacted the Respondents to complete the construction and to get the flat transferred with an occupancy



certificate. It is also alleged by the Complainants that the very foundations on which the occupancy certificate was granted are serious violations of law for which the only consequence seems to be the same fate as the "Coral Cove" project of the same builder in Maradu. The Complainants were not willing to put their life at risk by entering a building that does not have the minimum required Fire Safety measures. Even assuming the State Authorities grant them the permissions based on any 'technicality', the Complainants are unwilling to move into an apartment that is known to be a Fire Hazard. Hence the Complainants seek refund of amount paid by them with interest from the Respondent.

3. The Respondents filed written statements in which it is submitted as follows: The complaint is not maintainable either in law or on facts of the case. When the first Respondent/ builder was trying hard to obtain the statutory sanctions, the complainants and other allottees were trying to stall the same by filing false cases before the Hon'ble High Court of Kerala and the Kerala State Human Rights Commission by impleading all the statutory Authorities and scaring them from processing the application and granting the necessary approvals. Since the two towers 4 and 5 were in the completed stage, after site inspection and since due to non-availability of Fire NOC, the Municipality numbered GF + 2 Floors they obtained partial occupancy certificate dated 26.07.2016. The allottees approached the Hon'ble High Court of Kerala through writ petition No. 26935/2019 regarding the sanctions obtained for the construction and the Hon'ble High Court of Kerala on 23/01/2020 cautioned the petitioners that if they are proceeding with this writ, the same will be dismissed with compensatory cost and hence the petition was dismissed as withdrawn. The Respondents further submitted that the then Thrikkarkara Grama Panchayat had issued a



construction NOC A4-1/2000 dated 31.08.2006 for developing the property in the name of landowners. The plan approved was for 8 blocks of G + 19 floors with 2 level car parking, common area facilities, and a total of 1217 units. Before the Municipality Building Rules came into force builder/promoter started construction in the terms of the NOC plan when no prior permission was required for any construction in Panchayat areas. Since the construction was made in terms of the NOC, KMBR are not applicable. Thrikkakara Grama Panchayat issued a certificate No. A1-1/08 dated 09.09.2008 to the builder that the NOC is in compliance with the terms of Circular No. 23548/RD2/08/LSGD dated 03.04.2008. Due to the pendency of the above said cases, the issuance of NOC was delayed and after persistent follow-up, they acted on the said circulars and certificate of approval No. F2-13396/2018 dated 06/08/2020 was issued certifying that all Rules and Norms pertaining to the fire safety arrangement are satisfied in Jains Tuffnell Garden. The Occupancy certificate was issued on 07/10/2020 by the Local Self Government, Thrikkakara Municipality. The Respondents submits that the prayers of the Complainants for refund of the amount with interest are not tenable and the complaints are bereft of any bonafides which are to be dismissed with cost to the Respondents.

4. Heard both parties in detail and examined all the documents produced by them. The Real Estate Project named 'Jain Tuffnell Garden' situated in Ernakulam District is registered under Sec 3 of the Act, 2016 vide Registration No. 201K-RERA/PRJ/ERN/011/2022. The learned counsel appearing for the Complainants argued that Section 18 of the Act 2016 speaks about Possession in accordance with the agreement for sale would mean only 'legal possession' and the Law cannot recognize 'illegal possession. The Kerala Municipality Building Rules categorically provide



that no building or apartment can be occupied without an 'occupancy certificate' and therefore any 'occupation' prior to the grant of 'occupancy certificate' is always illegal. When it comes to 'Agreement for Sale', it is governed by contract law and therefore the Authority cannot ignore Sec. 23 of the Contract Act which says that parties to an Agreement cannot agree to an object that is unlawful. Therefore, the parties to an agreement here cannot agree to take any illegal possession, only legal possession would be recognized. The Counsel submits that the Authority cannot ignore the provisions of Sec. 23 of the Contract Act while interpreting the Agreement for sale mentioned in Sec 18 of the Act, for the simple reason that Sec 23 of the Contract Act mentions "The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral or opposed to the public policy". The Counsel also argued that the Authority cannot ignore the operation of the provisions of Sec. 14 of the RERA Act just because the complaint is made under Sec 18 of the Act. In this case, the common areas and amenities can never be used by the complainant because the project is not complete in accordance with Sec 14 of the RERA Act. The Counsel for the complainant also invited our attention to the judgment of the Hon'ble Supreme Court in *M/s Newtech Promoters and Developers Pvt. Ltd Vs. State of UP 7& Others* (C.A No. 6745 of 2021) wherein the objectives of the Real Estate (Regulation & Development) Act 2016 (hereinafter referred to as 'the Act 2016') were pointed out. It is also alleged by the Complainants that completion certificate is fake. When the completion certificate was issued, there was no building permit, which was regularized much later in 2016. Thereafter, the builder in his application to RERA Authority gave a different completion date. In the affidavit before the



Hon'ble High Court that the building completion date given was March 2020 now cannot take a stand that the building was completed in 2013. The Counsel for the Complainants also brought to our notice, the judgement of the Hon'ble Supreme Court in Fortune Infrastructure & Another Vs. Trevor D'Lima & Others (2018) 5 SCC 442 in which it was held that "a person cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek a refund of the amount paid by him, along with compensation". But the judgements of the Andhra Pradesh State Consumer Disputes Redressal Commission in Vipul Kumar Misra Vs. M/s Maytas Properties Ltd. and that of the Hon'ble Supreme Court in Vinod Kumar Thareja V. M/s Alpha Construction produced from the side of the Complainants have no relevance here as this is not a case where the developer has executed the sale deed but there is no prospect of either constructing flats or delivering the property to the Complainants. The Complainants submitted that the Authority cannot be blind to the serious violations & illegalities brought to their notice, and cannot ignore the difficulties of home buyers who have made their lifetime investments into a Project for more than a decade and still not got possession.

5. In the reply arguments, the learned Counsel for the Respondents argued that this Authority has no jurisdiction to entertain these complaints in view of Section 18 of the Act 2016 and it can take cognizance only when the Promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the agreements for sale and that the allottee wishes to withdraw from the project. The Respondents produced copies of Completion certificate given by the Chartered Engineer for the project, Sale Deeds executed in favour of the Complainants and acknowledgements from the Complainants for receipt of sale deeds, KSEB



bills in the name of the Complainants, and Injunction orders passed by the Consumer State Commission, partial and final Occupancy Certificates obtained for the project and the Certificate regarding the Advance Disbursement Facility scheme issued to the Complainants by the Respondent Company. The Counsel for the Respondents strongly argued that the Complainants are the absolute owners in possession of their respective apartments and enjoying facilities in the project Jains Tuffnel Garden for which reason the said complaints are not maintainable in view of Section 18 of the Act 2016.

6. The facts unique in each of the above cases and findings of the Authority in each of them are as follows:

COMPLAINT NO. 254/21

1. On 10/03/2008, an agreement for sale and a Memorandum of Agreement were executed by the complainant with the Respondents, copies of which were produced and marked as Exbts. **A1** & **A2**. A sum of Rs.4,12,782/- was paid on 29.02.2008, and on 06.05.2008, the Complainants made another payment of Rs. 1500/- and a payment of Rs. 1,56,878/- on 25.08.2008. Thereafter, the bank disbursed the amount of Rs. 37,15,000/- on 22.05.2008. As per the agreement, the Respondents agreed to hand over possession of the apartments within 36 months from the date of starting the construction with a grace period of 3 months. According to the Complainants they paid an amount of Rs. 2,70,000/- on 13.04.2015 towards registration charges and the sale deed was executed on 25.10.2015 in their name. The relief sought by the Complainants is to refund the amount of Rs. 45,56,160/- along with interest at the rate of 14.15% from the date of



payment to the date of actual repayment. The Counsel for the Complainants argued that as per the agreement terms, the project was to be completed by December 2010 but the completion date mentioned by the builder during the registration u/s 3 of the Act 2016 is 23.03.2020. The case of the Complainants is that the Builder had cheated the allottees by collecting the full amount and without disclosing the illegalities involved in the project, executed the Sale Deed copy of which is produced and marked as Exbt A3. According to them, when there is specific clause in the agreement with regard to handing over possession, registration of the sale deed with specific mention about the status of the apartment shall not be a reason for the Authority to find that "Builder gave possession of the flat as per agreement". At the time of registration of the sale deed, the project did not even have a valid permit. The Building Permit was regularized only on 15/06/2016. Many of the flat owners were coerced to sign affidavits to get the key of the flat whereas the Complainants herein were not ready to execute such affidavit and hence the key is still with the Builder and the Complainants do not have possession of the apartment even now. The sale deed acknowledgment receipt produced is irrelevant as it was executed and collected by the builder himself. As they were compelled to sign an affidavit the complainant refused to take possession of the apartment. The Counsel for the complainants alleged that the order from the Consumer Court was obtained by playing fraud.

2. It was argued by the Counsel for the Respondents that the Sale deed of Apartment No. 4091 of the Complainants was executed on 22.12.2015 and the Complainants herein have received the title deed on 09.01.2016 and taken possession after which they applied for electricity connection and obtained it in their name. The electricity bills in the name of



the Complainants are also produced. The counsel argued that the Complainants are still occupying apartment No 4091 and enjoying all the amenities in the project 'Jains Tufnell Garden'. The Block 4 of Jains Tufnell Garden was completed as on 25.05.2013 as certified by the Chartered Engineer as per the Completion certificate, copy of which is produced. It is also submitted that the Complainants are enjoying all the amenities on the strength of the interim order dated 18.02.2019 in I A No. 152/2019 in CC No. 63/2018 obtained from the Consumer State Commission, Thiruvananthapuram, as evident from Exbt.B2, "restraining the builder from blocking/cutting off the basic amenities like water and electricity connections in residential flat No. 4091 in apartment complex and not to discontinue the services like lift facility, cleaning and security services provided to the Complainant and his family in the complex until further orders" and the Complainants categorically contended Consumer State Commission, that they are in possession of the apartment for obtaining the interim order. The Respondents allege that the payment of Rs. 13,20,060/- as EMI's to the loan account by the Respondent under SBI ADF Scheme is suppressed by the Complainants and the Complainants herein are defaulters and an amount of Rs. 98,933.73/- is still due to the 1st Respondent.

3. The above complaint was heard by the full bench of the Authority along with the connected complaints. On the basis of the pleadings and arguments by both the parties, as detailed above, the Authority unanimously came to the same conclusion and decided to pass a common verdict but through different views and findings of (1) the Chairman & Member- Smt. Preetha P Menon (2) Member- Sri. M P Mathews, in the following manner:



(1) Views & findings of Chairman & Member- Smt. Preetha P Menon

4. The documents produced by the complainant are marked as **Exhibits A1 to A9** and the documents produced by the Respondents are marked as **Exhibits B1 to B8**. According to the Exbt.A2 Memorandum of Agreement/agreement for construction, the promoter had agreed to construct one flat No. 4091 on the 9th floor in Block No 4 of the Project. The Respondents had also agreed to complete the entire construction of the flat/Residential complex within a period of 36 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stage payment without any default. The consideration set forth in the Exbt.A3 Sale Deed dated 25/10/2015 is *Rs. 42,70,505/ for" 30.24 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in the land of 343.73 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4091 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 9th floor in the multi-storeyed building named 'Jain Tuffnell Gardens" and covered car park marked as No. 4091 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors 1 to 3"*. The entire sale consideration is stated to have been paid to the vendors who are the landowners and the 1st Respondent. It is admitted by the Complainant that after paying the full amount of consideration, as per the direction of the 1st Respondent, the Complainant paid an amount of Rs. 2,70,000/- also on 13.04.2015 towards

registration costs of the flat and got the Exbt. A3 sale deed executed by the Respondents on 25.10.2015.

5. The copy of the electricity bill dated 26/11/2019 in the name of the Complainant is produced by the Respondent and marked as Exhibit B1. The Complainants had also approached the Hon'ble State Consumer Disputes Redressal Commission through Complaint No. 63/2018 and obtained an interim order dated 18/02/2019, copy produced and marked as Exbt.B2 as per which "*the Respondents/Promoter and the Landowners were directed not to block/cut off the basic amenities like water and electricity connections provided with residential flat No. 4091 and not to discontinue the services like lift facility, cleaning and security services provided to the complainants and their family in the complex until further orders*". The counsel for the Respondents also argued that the Complainants have taken specific contention before the Consumer Commission that they are in possession of the apartment for obtaining such an order. So, after perusing Exbt. A3 sale deed along with the Exbt. B2 order, it is hard to accept the argument of the Complainants that they never took possession of the flat and the key of the flat is never handed over to them. At the same time there is sufficient reason to believe that the possession was handed over as the complainants who got the sale deed executed and approached the consumer commission to ensure that the common amenities to their apartment were not cut off and obtained a favourable order.

6. As far as other issues, raised by the learned counsel appeared for the Complainants, regarding violations in constructions or veracity of statutory sanctions are concerned they will come under the purview of local authority concerned which is the competent authority as per



the Building Rules issuing Occupancy Certificate for such real estate projects. Here the copy of Occupancy Certificate is produced by the Respondents and marked as Exbt. B3. According to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the prescribed format. Occupancy certificate issued by the Secretary certifies that "the work executed is in accordance with the permit and the building is fit for occupation/use". As per the definition in the Real Estate Regulation and Development Act, 2016, the "occupancy certificate" issued by the competent authority permits occupation of building as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. Considering the contention of the Counsel for the Complainant regarding violation of Section 14(1) of the Act 2016, as per the said provision, "*The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities*". Once the occupancy certificate is issued by the local body, it is to be presumed that the section 14(1) stands complied with and it presumes that all other statutory sanctions have been obtained for the project. Copy of Fire NOC dated 06.08.2020 obtained for the project is also produced by the Respondent which is marked as Exbt. B8. The project in question is a registered project before this Authority under section 3 of the Act, 2016 in which the date completion of the project is given as 31.05.2024. So, the statement of the Complainants' counsel that "the date of completion shown before the Authority is 23.03.2020" is false. Anyhow, this date has nothing to do with the Promised date of completion in the case of ongoing Real Estate Projects. As per the documents of registration with us, the Respondent/Promoter has



registered only 2 blocks comprising a total floor area of 34,576 sq.m., as mentioned in the building permit. So, the Complainants could have raised such objections, with respect to issuance of any of such statutory approvals, right before the concerned Authority who issued such certificates. In the reply arguments, the learned counsel for the Respondent/Promoter submitted that the allottees approached the Hon'ble High Court of Kerala through writ petition No. 26935/2019 regarding the veracity of sanctions obtained for the construction and the Hon'ble High Court of Kerala on 23/01/2020 cautioned the petitioners that if they are proceeding with that writ, the same will be dismissed with compensatory cost and subsequently the petition was dismissed as withdrawn.

7. The prayer in the Complaint is for direction to refund the amount paid by the Complainants along with interest as provided under Section 18(1) of the Real Estate (Regulation & Development) Act 2016. Section 18(1) of the Act 2016 specifies that "*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.*" As per Section 19(4) of the Act 2016, "*the allottee shall be entitled to claim the refund of the amount paid with interest at such rate as may be prescribed, 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 the agreement for sale”.

8. Section 18(1) 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 clearly offers 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. It is obvious that the allottees cannot opt both the options together at any point of time. Here, the Complainants who are literate persons could have very well objected/denied execution of Exbt. A3 sale deed and decided to withdraw from the project much earlier but no document has been placed before us to prove that they had intimated such a decision or unwillingness to the Respondent/Promoter. The Respondent's Counsel vehemently argued that the Complainants were in possession of the apartment after handing over the original sale deed on 09.01.2016 and were enjoying all the amenities provided in the project which is evident from the Exbt. B2 order of the Consumer Commission and the electricity bills. If at all, the Complainants are still denied possession of the apartment by the Respondents, even after the execution of Exbt. A3 sale deed transferring the ownership and all the rights over the property, they have every right to approach appropriate judicial forum against the Respondents. In these circumstances, there is no reason for us to believe that even after execution and handing over the sale deed, possession was not handed over to the Complainants and the Complainants also failed to place on record any documents to corroborate their claim. Undoubtedly, the Complainants herein have not succeeded to prove that the Respondent/Promoter failed to

complete or unable to hand over possession of the apartment to the Complainants in accordance with the terms of the agreement for sale. Hence it is found that the Complainants/allottees who obtained title and ownership over the apartment No. 4091 in Block 4 of the project from the Respondents/Promoters are not eligible for withdrawing from the project and getting refund of the amount paid by them as per Section 18(1) of the Act 2016.

9. In view of the aforementioned facts and findings, it is found that the Complainants are not entitled to withdraw from the project at this stage and claim refund of the amount paid by them with interest as provided under Section 18 (1) of the Act 2016.

Sd/-

Smt. Preetha P Menon
Member

Sd/-

Sri. P H Kurian
Chairman

(2) Views & findings of Member- Sri. M P Mathews

10. After having heard the learned counsels for the parties and perusing the documents produced the following issues emerged for consideration

- 1) Whether the promoter has failed to complete the apartment in accordance with the terms of the agreement for sale by the date specified therein?
- 2) Is the promoter unable to give possession of the apartment in accordance with the terms of the agreement for sale duly completed by the date specified therein?



3) **Whether the complainants are entitled to get refund of the amount paid by them ?**

11. Documents produced by the complainant are marked as **Exhibit A1 to A9** and the documents produced by the respondents are marked as **Exhibits B1 to B8**. Ongoing through the documents produced by the allottees, it is seen that there is an Agreement for sale dated 10/03/2008 executed between Landowner represented by the 2nd Respondent who had signed as authorized signatory for the promoter of the 1st Respondent company and the Complainant is produced and marked as **Exhibit A1** and Memorandum of Agreement dated 10/03/2008 executed between the 1st Respondent and the Complainant is produced and marked as **Exhibit A2**. According to the Memorandum of Agreement, the complainant/allottee proposed to construct flats in Block 4 mentioned in Schedule 'C' of the agreement. According to the Memorandum of Agreement the promoter had agreed to construct one flat numbered 4091 in block No 4 on the 9th floor in the property referred to in the agreement for sale dated 10/03/2008 for purchase of undivided share out of schedule A property described in the schedule B referred to in the agreement. The lumpsum contract amount for the construction of the flat as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs. 38,98,505/-. It is referred to under clause 12 a) of the agreement that "Handing over of possession of the constructions" shall mean handing over possession of the constructed super built space with standard specifications agreed upon and, in any context, does not cover the electrical, water, sewage and other service connections which are regulated by Government and other statutory bodies from time to time. It was also agreed that the common amenities and facilities, if any, proposed or to be

proposed, shall be completed and handed over to the majority of the owners acting through a common body, after 3 months of handing over of possession in the project "Jain Tuffnell Park" It was also agreed that non completion of common amenities/facilities at the time of handing over possession of the individual flat/apartment shall not be a hindering or deterring factor for taking over of possession by the Complainant/Allottee and the promoter/ Respondent shall not be liable for any damages or payment of interest. The allottees/ Complainant agreed and confirmed that they shall not raise any claim, whatsoever in nature on that account. The Promoter/ Respondent had also agreed to complete the entire construction of the flat/Residential complex within a period of 36 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stage payment without any default. No compensation is seen given in this case.

12. The consideration set forth in the instrument dated 25/10/2015 is Rs 42,70,505/ for 30.24 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in all that land having a total extent of 343.73 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4091 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 9th floor in the multistoried building named 'Jain Tuffnell Gardens" and covered car park marked as No. 4091 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors 1 to 3 represented by the Power Of Attorney Holder/2nd Respondent and the 1st Respondent represented by the 2nd Respondent. The

entire sale consideration is stated to have been paid to the vendors who are the landowners and the 1st Respondent. The copy of the sale deed dated 25/10/2015 is produced and marked as **Exhibit A3**. The sale deeds were executed in favour of the complainants transferring both the apartment and the undivided share over the common areas, before the Real Estate Regulation and Development Act was in force. It is admitted by the Complainant that after collecting the full payment, as per the direction of the 1st Respondent, the Complainant paid an amount of Rs. 2,70,000/- on 13.04.2015 towards registration costs of the flat and got the sale deed executed by the Respondent on 25.10.2015. **Hence it is evident from the execution of the sale deed that the apartments were completed as per the terms of the agreement for sale.**

13. Under Chapter IV of the Kerala (Regulations & Development Act, 2016) Rights and duties of the Allottees

Sec. 19 (3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4. According to Clause 4(2)(1)(C) "The time period within which he undertakes to complete the project or phase thereof, as the case may be;" In the case of ongoing projects the time period within which the promoter undertake to complete the project is as given in the agreement executed between the complainant and the respondent before commencement of the Act, 2016. In Imperia Structures Ltd. (M/s) v. Anil Patni and Another (2020 KHC 6620), it is clarified that for the purposes of S.18, the period has to be reckoned in terms of the agreement and not the registration.

14. The copy of the electricity bill dated 26/11/2019 in the name of the Complainant is produced by the Respondent and marked as **Exhibit B1**. The Complainant has come up with a new allegation in the argument note which is extracted below "*The Complainants never took possession of the flat and the key of the flat is never handed over to the Complainants.*" However, the Complainant had approached the Hon'ble State Consumer Disputes Redressal Commission through Complaint No. 63/2018 and obtained an interim order in IA No.152/2019, as prayed for to ensure that the common amenities enjoyed by the complainant are not cutoff or denied by the respondent. The IA was allowed vide order dated 18/02/2019 and the Respondents/Promoter and the Landowners were directed not to block/cut off the basic amenities like water and electricity connections provided with residential flat No. 4091 and not to discontinue the services like lift facility, cleaning and security services provided to the complainant and his family in the complex until further orders. The order dated 18/02/2019 of the Consumer State Commission has been produced by the Respondent and marked as **Exhibit B2**. There is sufficient reason to believe that the key was handed over as the complainant approached the consumer commission to ensure that his common amenities to the apartment were not cut off. The prayer as such was allowed by the Consumer Commission based on the submissions of the complainant. The complaint was dismissed as withdrawn on 01/10/2021, by the Hon'ble Consumer Commission. The allottees are entitled to claim possession of their apartment as per the declaration given by the promoter under section 4(2) (1) (C). In the case of ongoing project it is the time period mentioned in the agreement executed before the commencement of the Act, 2016. It is also confirmed by the Consumer Court order produced by the respondent



that the basic amenities were enjoyed by the complainant in his apartment. The electricity bill dated 26/11/2019 in the name of the complainant establishes the fact that the complainant was very much in possession of the apartment as he had submitted application to the KSEB and obtained electricity connection. **Therefore, it is confirmed that the complainant had taken possession, after execution of the sale deed in his favour by the Promoter/landowner on 25/10/2015.**

15. Occupancy Certificate received for the project was produced by the respondents and marked as **Exhibit B3**. This is not a case where there is no prospect of either constructing flats or delivering the property to the complainants, and the citations quoted by the respondent have no relevance as far as this case is concerned. Handing over possession is defined in the agreement and based on the agreement for sale executed between the complainant and the respondent, the apartment and the undivided share over the common areas were transferred over after receiving consideration. As per Sec 23 of the Indian Contract Act the consideration and object of the agreement are Lawful.

16. As per section 19(10) every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building as the case may be. It is the duty of the allottee to take physical possession as per section 19(10), while it is the right of the allottee as per section 19(3) to claim possession of the apartment, plot, or building as the case may be. Here the allottee had taken possession of the apartment after execution of the sale deed exercising his right voluntarily, and just because possession was handed over the

complainant is under no compulsion to start occupying the building. Usually after taking over possession of the building the interior works of the apartment are executed directly by the allottee and the respondent cannot be held responsible for the illegal occupation of the building before obtaining the occupancy certificate. It is evident that the complainant was in possession of his apartment before the occupancy certificate was obtained, from the interim order of the Consumer Court in the year 2019. The word "illegal" has an extensive meaning, including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for civil suit ending in damages. In this case the ownership and possession of the apartment enjoyed by the complainant cannot be considered as illegal possession. The apartment was handed over by the promoter to the allottee after execution of the sale deed transferring the apartment as per the agreement for sale. From the consideration shown in the sale deed, agreements executed and the claim for reimbursement made by the complainants it is evident that the construction of the apartment was completed to the satisfaction of the complainants as per the agreements executed. It is therefore concluded that the apartments were completed as per the terms of the agreement for sale and possession was handed over.

17. All other issues of violations pointed out by the complainants are to be considered by the concerned local body that has issued the occupancy Certificate, or the forum that is seized of the matter. According to the definition in the Real Estate Regulation and Development Act, 2016, occupancy certificate issued by the competent authority permits occupation of building as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. According

to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the form in Appendix H. Occupancy certificate issued by the Secretary certifies that the work executed is in accordance with the permit and the building is fit for occupation/use.

18. There was no compulsion on the complainant to take possession but the complainant is entitled to claim possession of the apartment under 19(3) of the Act, 2016. **When possession was handed over under Sec. 19(3) of the Act after execution of the sale deed transferring the apartment to the complainant, and the complainant is enjoying ownership and possession of the apartment in the real estate project withdrawal from the project cannot be considered under section 18 of the Act, 2016.** A person who is put in possession of the property under an agreement for sale can only be evicted through the due process of law. It is accepted by the complainant that he is in possession of the property and the argument that it is illegal possession cannot be accepted by the authority when the complainant had taken possession on his own free will and even approached the Consumer Court and obtained an order restraining the respondent from disconnecting the common amenities like water and electricity.

19. Section 14(1) "The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities". Once the occupancy certificate is issued by the local body it is confirmed that the section 14(1) stands complied with.

Occupancy certificate was issued on 07/10/2020 and the date of completion is shown in the occupancy certificate is 23/03/2020.

20. Real Estate (Regulation and Development) Act, 2016 Section 18 deals with return of amount and compensation S.18(1) "If the promoter fails to complete or is unable to give possession of an apartment, plot or building,-

(a) 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.

As per Section 19(4) the allottee shall be entitled to claim the refund of the amount paid with interest as such rate as may be prescribed, 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 the agreement for sale".

21. Section 18 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 or, as the case maybe duly completed by the date specified therein. Agreement for sale was only for the sale of undivided share and the apartment was

transferred along with the undivided share over the common areas to the complainants on 25/10/2015. 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 can be concluded that the complainant has voluntarily taken possession after transferring the apartment along with the undivided share to his name thereby exercising the option to continue with the project.

22. The complainant had filed petition for refund under section 18 of the Real Estate Regulation and Development Act only after the sale deed was executed in his favour, possession was handed over, electricity connection was obtained in his favour, and after the occupancy certificate was issued by the local body for the real estate project. It is also clear that the Complainant was enjoying the common amenities and had approached the consumer forum to ensure that the same are not cut off by the Respondents. For the aforementioned reasons, it is found that, the complaint under Section 18 for withdrawing from the real estate project claiming the return of the amount paid to the promoter with interest cannot be entertained.

Sd/-

Sri. M. P. Mathews

Member II

COMPLAINT NO. 255/21

1. According to the complainant herein, on 10.03.2008, he had entered into an agreement for sale and a Memorandum of Agreement with the respondent for the construction of the apartment and the bank disbursed the loan amount of Rs. 24,75,000/- on 22.05.2008. Additionally, the Complainant had paid a sum of Rs. 50,000/- on 28.08.2007, Rs. 50,000/- on 23.01.2008, Rs. 100000 on 08.02.2008, Rs. 1,00,000/- on 03.03.2008 and Rs. 9,462/- on 08.03.2008. The complainant also paid an amount of Rs. 3,10,462/- on 1.05.2008. The balance amount of Rs. 1,25000/- have been settled by the Respondents under the pretext of delayed compensation. The Complainants paid an amount of Rs. 2,20,000/- on 15.09.2017 towards the registration cost of the Flat and the sale deed was executed on 19.09.2017. The apartment of the Complainants is on the 4th floor of the 4th Block. The respondent was not ready to give possession of the flat as the Complainants were reluctant to sign the affidavit prepared by the Builder with completely wrong averments. The relief sought by the Complainant is a refund amount of Rs. 33,14,924/- along with interest at the rate of 14.15% from the date of payment to the date of actual repayment.

2. The Respondents submitted that they handed over the original sale deed of apartment No. 4046 of the Complainant to the bank as directed by the Complainants on 13.11.2017. The Complainants have also taken possession of apartment No. 4046 on 13.11.2017. Thereafter, they applied for an electricity connection in the name of the Complainant. Complainant has leased apartment No. 4046 to tenants and enjoying all the amenities in Jains Tufnell. It was submitted that the work in all 8 blocks progressed in the expectation of the market. But unfortunately, the market

dip down, and out of 1217 units planned, the first Respondent could sell only 70 plus units during 2011-12. With one tower comprising 152 units, management decided to scale down the project to 2 towers comprising 304 units with a clubhouse which was almost getting completed in structure work during 2011. The scaling down of the project was informed to all customers via e-mail on 20.11.2012. An amount of Rs. 3,18,116/- was due from the Complainants as on 30.10.2014. The Complainants were insisting for payment of compensation for the delay in handing over of the apartment as a pre-condition for registration of the apartment. Finally, after mutual discussion has agreed for the full and final settlement of the issue by paying compensation @ Rs. 6/- per sq.ft for 36 months amounting to Rs. 3,18,816/- This compensation was calculated and set off was allowed as a special case even though there was delay on the part of the complainants in making the payments as per payment schedule.

3. It was argued by the learned counsel appearing for the Complainant that they executed an agreement for sale of undivided share of the property with the respondent on 10.03.2008 along with an agreement for construction of the apartment No. 4046 in the 4th Block after payment of 10% of the agreed amount. As per the agreement terms, the project was to be completed by December 2010. But the completion date mentioned by the builder in the registration application is 23.03.2020. The Builder had cheated the allottees by collecting the full amount and without disclosing the illegalities involved in the project, executed the Sale Deed. And when there is a specific clause in the agreement with regard to handing over possession, registration of the sale deed with specific mention about the status of the apartment shall not be a reason for the Authority to find that "Builder gave possession of the flat as per agreement". At the time of registration of the

sale deed, the project did not even have a valid permit. The Building Permit was regularized only on 15/06/2016. Many of the flat owners were coerced to sign affidavits to get the key of the flat whereas the Complainants herein were not ready to execute such affidavit and hence the key is still with the Builder. In short, the Complainants do not have 'possession of the apartment even to this day. It was submitted that none of the evidence produced by Respondent is relevant or proves their case. The sale deed acknowledgment receipt produced is irrelevant as it was executed and collected by the builder himself. As they were compelled to sign an affidavit the complainant refused to take possession of the apartment. The Builder /Promotor's contention that he settled Rs. 1,25,000/- under the pretext that it is the delay compensation and the Complainants agreed for the same as they were misguided by the flat is ready for occupation. No such money was paid by the builder to the Complainants and it was shown as 'special approved compensation" It is submitted that no money exchange in the name of "compensation" ever took place between the builder and the Complainants. Moreover, in this complaint, the Complainant has only claimed the money he paid to the builder. There was no occasion for any deduction because there were no money paid by the builder to the complainant as compensation.

4. The above complaint was heard by the full bench of the Authority along with the connected complaints. On the basis of the pleadings and arguments by both the parties, as detailed above, the Authority unanimously came to the same conclusion and decided to pass a common verdict but through different views and findings of (1) the Chairman & Member – Smt Preetha P Menon (2) Member- Sri. M P Mathews, in the following manner:

(1) Views & findings of Chairman & Member- Smt.Preetha P Menon

5. The documents produced by the complainant are marked as Exhibit A1 to A4 and the documents produced by the Respondents are marked as Exhibits B1 to B8. The copy of the Agreement for sale dated 10/03/2008 is produced by the Complainant and marked as Exhibit A1. As per the Memorandum of Agreement, copy of which is produced and marked as Exbt A2, the Promoter agreed to construct one flat No. 4046 in block No 4 on the 4th floor in the property referred to in the agreement for sale dated 10/03/2008 for purchase of undivided share out of schedule A property described in the schedule B referred to in the agreement. The lumpsum contract amount for the construction of the flat as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs.28,65,305/- The Promoter/ Respondent had also agreed to complete the entire construction of the flat/Residential complex within a period of 48 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stage payment without any default. The counsel for the Respondents submitted that when the Complainants insisted for payment of compensation for the delay in handing over of the apartment as a pre-condition for registration of the apartment, they finally, after mutual discussion agreed to the full and final settlement of the issue by paying compensation @ Rs. 6/- per sq. ft for 36 months amounting to Rs. 3,18,816/.

6. The consideration set forth in the sale deed dated 19/09/2017 is Rs 27,34,000/- for 30.24 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in all that land having a

total extent of 343.73 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4046 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 4th floor in the multi storied building named 'Jain Tuffnell Gardens' and covered car park marked as No. 4046 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors. The sale consideration is stated to have been paid to the vendors who are the landowners and the 1st Respondent. The copy of the sale deed dated 19/09/2017 is produced and marked as Exhibit A3. It is admitted by the Complainant that after collecting the full payment, as per the direction of the 1st Respondent, the Complainant paid an amount of Rs. 2,20,000/- on 15.09.2017 towards registration costs of the flat and got the sale deed executed by the Respondent on 19.09.2017. The copy of the electricity bill dated 26/11/2019 in the name of the Complainant is produced by the Respondent and marked as Exhibit B1. Email correspondence from 03/06/2017 to 21/07/2017 is produced by the respondent and marked as Exhibit B2. Consequent to the mail dated 21/07/2017 of the Promoter to the Allottee/Complainant regarding compensation for delayed delivery of the apartment the registration cost of Rs. 2,20,000/ is admittedly paid by the complainant on 15/09/2017 and the sale deed was executed on 19/09/2017. Even though no document placed on record by the Respondent's counsel, he repeatedly stated that the said apartment was leased out by the Complainant. In view of the above facts, it is clear that the possession was handed over to the complainant after settling compensation for late delivery of the apartment as claimed by the complainant vide mail dated 02/03/2017. The electricity bill dated 26/11/2019 in the name of the complainant establishes the fact that the complainant was very much in possession of the apartment as he had submitted application to the KSEB and obtained electricity

connection. Therefore, it is confirmed that the complainant had taken possession, after execution of the sale deed in his favour by the Promoter/landowner on 19/09/2017 and received compensation from the Respondents for delayed delivery of the apartments.

7. As far as other issues, raised by the learned counsel appeared for the Complainants, regarding violations in constructions or veracity of statutory sanctions are concerned they will come under the purview of local authority concerned which is the competent authority as per the Building Rules issuing Occupancy Certificate for such real estate projects. Here the copy of Occupancy Certificate is produced by the Respondents and marked as Exbt. B3. According to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the prescribed format. Occupancy certificate issued by the Secretary certifies that "the work executed is in accordance with the permit and the building is fit for occupation/use". As per the definition in the Real Estate Regulation and Development Act, 2016, the "occupancy certificate" issued by the competent authority permits occupation of building as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. Considering the contention of the Counsel for the Complainant regarding violation of Section 14(1) of the Act 2016, as per the said provision, "*The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities*". Once the occupancy certificate is issued by the local body, it is to be presumed that the section 14(1) stands complied with and it presumes that all other statutory sanctions have been obtained for the project. Copy of Fire

NOC dated 06.08.2020 obtained for the project is also produced by the Respondent which is marked as Exbt. B8. The project in question is a registered project before this Authority under section 3 of the Act, 2016 in which the date completion of the project is given as 31.05.2024. So, the statement of the Complainants' counsel that "the date of completion shown before the Authority is 23.03.2020" is false. Anyhow, this date has nothing to do with the Promised date of completion in the case of ongoing Real Estate Projects. As per the documents of registration with us, the Respondent/Promoter has registered only 2 blocks comprising a total floor area of 34,576 sq.m., as mentioned in the building permit. So, the Complainants could have raised such objections, with respect to issuance of any of such statutory approvals, right before the concerned Authority who issued such certificates. In the reply arguments, the learned counsel for the Respondent/Promoter submitted that the allottees approached the Hon'ble High Court of Kerala through writ petition No. 26935/2019 regarding the veracity of sanctions obtained for the construction and the Hon'ble High Court of Kerala on 23/01/2020 cautioned the petitioners that if they are proceeding with that writ, the same will be dismissed with compensatory cost and subsequently the petition was dismissed as withdrawn.

8. The prayer in the Complaint is for direction to refund the amount paid by the Complainants along with interest as provided under Section 18(1) of the Real Estate (Regulation & Development) Act 2016. Section 18(1) of the Act 2016 specifies that "*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.” As per Section 19(4) of the Act 2016, *“the allottee shall be entitled to claim the refund of the amount paid with interest as such rate as may be prescribed, 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 the agreement for sale”.*

9. Section 18(1) 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 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. Anyhow, the allottees cannot opt both the options together at any point of time. The Complainants who are literate persons could have very well objected/denied execution of Exbt. A3 sale deed and decided to withdraw from the project much earlier but no document has been placed before us to prove that they had intimated such a decision or unwillingness to the Respondent/Promoter. If at all, the Complainants are still denied possession of the apartment by the Respondents, even after the execution of Exbt. A3 sale deed transferring the ownership and all the rights over the property, they have every right to approach appropriate judicial

forum against the Respondents. The Respondent's Counsel vehemently argued that the Complainants were in possession of the apartment and were enjoying all the amenities provided in the project and the apartment has been leased out to another person. Exbt B1 electricity bill and Exbt B2 email correspondence are produced by the Respondent to substantiate their claim. The Electricity bills in the name of the Complainant are also produced by the Respondent to substantiate their claim. In these circumstances, there is no reason for us to believe that even after execution and handing over the sale deed, possession was not handed over to the Complainants and the Complainants also failed to place on record any documents to corroborate their claim. Undoubtedly, the Complainants herein have not succeeded to prove that the Respondent/Promoter failed to complete or unable to hand over possession of the apartment to the Complainants in accordance with the terms of the agreement for sale. Hence it is found that the Complainants/allottees who obtained title and ownership over the apartment No. 4046 in Block 4 of the project from the Respondents/ Promoters are not eligible for withdrawing from the project and getting refund of the amount paid by them as per Section 18(1) of the Act 2016.

10. In view of the aforementioned facts and findings, it is found that the Complainants are not entitled to withdraw from the project at this stage and claim refund of the amount paid by them with interest as provided under Section 18 (1) of the Act 2016.

Sd/-
Smt. Preetha P Menon
Member

Sd/-
Sri. P H Kurian
Chairman

(2) Views & findings of Member -Sri. M P Mathews

11. After having heard the learned counsels for the parties and pursuing the documents produced the following issues emerged for consideration

1. **Whether the promoter has failed to complete the apartment in accordance with the terms of the agreement for sale by the date specified therein ?**

2. **Is the promoter unable to give possession of the apartment in accordance with the terms of the agreement for sale duly completed by the date specified therein?**

3. **Whether the complainants are entitled to get refund of the amount paid by them ?**

12. Documents produced by the complainant are marked as Exhibit A1 to A4 and the documents produced by the respondents are marked as Exhibits B1 to B8. Ongoing through the documents produced by the allottees, it is seen that there is an Agreement for sale dated 10/03/2008 executed between Landowner represented by the 2nd Respondent who has signed as authorized signatory for the promoter of the 1st Respondent company and the Complainant, is produced and marked as **Exhibit A1**. According to the Memorandum of Agreement, the complainant/allottee proposed to construct flat in Block 4 mentioned in Schedule 'C' of the agreement. According to the Memorandum of Agreement the promoter had agreed to construct one flat numbered 4046 in block No 4 on the 4th floor in the property referred to in the agreement for sale dated 10/03/2008 for purchase of undivided share out of schedule A property described in the

schedule B referred to in the agreement. The lumpsum contract amount for the construction of the flat as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs.28,65,305/- It is referred to under clause 12 a) of the agreement that "Handing over of possession of the constructions" shall mean handing over possession of the constructed super built space with standard specifications agreed upon and, in any context, does not cover the electrical, water, sewage and other service connections which are regulated by Government and other statutory bodies from time to time. It was also agreed that the common amenities and facilities, if any, proposed or to be proposed, shall be completed and handed over to the majority of the owners acting through a common body, after 3 months of handing over of possession in the project "Jain Tufnell Park" It was also agreed that non completion of common amenities/facilities at the time of handing over possession of the individual flat/apartment shall not be a hindering or deterring factor for taking over of possession by the Complainant/Allottee and the promoter/ Respondent shall not be liable for any damages or payment of interest. The allottees/ Complainant agreed and confirmed that they shall not raise any claim, whatsoever in nature on that account. The Promoter/ Respondent had also agreed to complete the entire construction of the flat/Residential complex within a period of 48 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stage payment without any default. As per the Respondents, when the Complainants insisted for payment of compensation for the delay in handing over of the apartment as a pre-condition for registration of the apartment, they finally, after mutual discussion agreed to the full and final settlement of the issue by paying

compensation @ Rs. 6/- per sq. ft for 36 months amounting to Rs. 3,18,816/- . The copy of the Memorandum of Agreement is produced by the Complainant and marked as **Exhibit A2**.

13. The consideration set forth in the instrument dated 19/09/2017 is Rs 27,34,000/- for 30.24 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in all that land having a total extent of 343.73 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4046 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 4th floor in the multistoried building named 'Jain Tuffnell Gardens" and covered car park marked as No. 4046 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors 1 to 3 represented by the Power Of Attorney Holder/2nd Respondent and the 1st Respondent represented by the 2nd Respondent. The entire sale consideration is stated to have been paid to the vendors who are the landowners and to the 1st Respondent. The copy of the sale deed dated 19/09/2017 is produced and marked as **Exhibit A3**. The sale deeds were executed in favour of the complainants transferring both the apartment and the undivided share over the common areas. It is admitted by the Complainant that after collecting the full payment, as per the direction of the 1st Respondent, the Complainant paid an amount of Rs. 2,20,000/- on 15.09.2017 towards registration costs of the flat and got the sale deed executed by the Respondent on 19.09.2017. **Hence it is evident from the execution of the sale deed that the apartments were completed as per the terms of the agreement for sale.**

14. Under Chapter IV of the Kerala (Regulations & Development Act, 2016) Rights and duties of the Allottees. Sec. 19 (3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4. According to Clause 4(2)(1)(C) "The time period within which he undertakes to complete the project or phase thereof, as the case may be;" In the case of ongoing projects the time period within which the promoter undertake to complete the project is as given in the agreement executed between the complainant and the respondent before commencement of the Act, 2016. In *Imperia Structures Ltd. (M/s.) v. Anil Patni and Another* (2020 KHC 6620), it is clarified that for the purposes of S.18, the period has to be reckoned in terms of the agreement and not the registration.
15. The copy of the electricity bill dated 26/11/2019 in the name of the Complainant is produced by the Respondent and marked as **Exhibit B1**. The Complainant has come up with a new allegation in the argument note which is extracted below "*The Complainants never took possession of the flat and the key of the flat is never handed over to the Complainants.*" Email correspondence from 03/06/2017 to 21/07/2017 is produced by the respondent and marked as **Exhibit B2**. Consequent to the mail dated 21/07/2017 of the Promoter to the Allottee/Complainant regarding compensation for delayed delivery of the apartment the registration cost of Rs 2,20,000/ is admittedly paid by the complainant on 15/09/2017 and the sale deed was executed on 19/09/2017. It is evident from the above that the possession was handed over to the complainant after

settling compensation for late delivery of the apartment as claimed by the complainant vide mail dated 02/03/2017. The allottees are entitled to claim possession of their apartment as per the declaration given by the promoter under section 4(2) (1) (C). In the case of ongoing project it is the time period mentioned in the agreement executed before the commencement of the Act, 2016. The electricity bill dated 26/11/2019 in the name of the complainant establishes the fact that the complainant was very much in possession of the apartment as he had submitted application to the KSEB and obtained electricity connection. **Therefore, it is confirmed that the complainant had taken possession, after execution of the sale deed in his favour by the Promoter/landowner on 19/09/2017.**

16. Occupancy Certificate received for the project was produced by the respondents and marked as **Exhibit B3**. This is not a case where there is no prospect of either constructing flats or delivering the property to the complainants, and the citations quoted by the respondent have no relevance as far as this case is concerned. Handing over possession is defined in the agreement and based on the agreement for sale executed between the complainant and the respondent, the apartment and the undivided share over the common areas were transferred over after receiving consideration. As per Sec 23 of the Indian Contract Act the consideration and object of the agreement are Lawful.

17. As per section 19(10) every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building as the case may be. It is the duty of the allottee

to take physical possession as per section 19(10), while it is the right of the allottee as per section 19(3) to claim possession of the apartment, plot, or building as the case may be. Here the allottee had taken possession of the apartment after execution of the sale deed exercising his right voluntarily, and just because possession was handed over the complainant is under no compulsion to start occupying the building. Usually after taking over possession of the building the interior works of the apartment are executed directly by the allottee and the respondent cannot be held responsible for the illegal occupation of the building before obtaining the occupancy certificate. The word "illegal" has an extensive meaning, including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for civil suit ending in damages. In this case the ownership and possession of the apartment enjoyed by the complainant cannot be considered as illegal possession. The apartment was handed over by the promoter to the allottee after execution of the sale deed transferring the apartment as per the agreement for sale. From the consideration shown in the sale deed, agreements executed and the claim for reimbursement made by the complainants it is evident that the construction of the apartment was completed to the satisfaction of the complainants as per the agreements executed. It is therefore concluded that the apartments were completed as per the terms of the agreement for sale and possession was handed over.

18. All other issues of violations pointed out by the complainants are to be considered by the concerned local body that has issued the occupancy Certificate, or the forum that is seized of the matter. According to the definition in the Real Estate Regulation and Development Act, 2016, occupancy certificate issued by the competent authority permits occupation of building as provided under local laws, which has provision

for civic infrastructure such as water, sanitation and electricity. According to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the form in Appendix H. Occupancy certificate issued by the Secretary certifies that the work executed is in accordance with the permit and the building is fit for occupation/use.

19. There was no compulsion on the complainant to take possession but the complainant is entitled to claim possession of the apartment under 19(3) of the Act, 2016. **When possession was handed over under 19(3) of the Act after execution of the sale deed transferring the apartment to the complainant, and the complainant is enjoying ownership and possession of the apartment in the real estate project withdrawal from the project cannot be considered under section 18 of the Act, 2016.** A person who is put in possession of the property under an agreement for sale can only be evicted through the due process of law. It is accepted by the complainant that he is in possession of the property and the argument that it is illegal possession cannot be accepted by the authority when the complainant had taken possession on his own free will, after settling full payment and execution of sale deed in his favour.

20. Section 14(1) "The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities". Once the occupancy certificate is issued by the local body it is confirmed that the section 14(1) stands complied with. Occupancy certificate was issued on 07/10/2020 and the date of completion is shown in the occupancy certificate is 23/03/2020.

21. Section 18 deals with return of amount and compensation S.18(1) "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".

As per Section 19(4) the allottee shall be entitled to claim the refund of the amount paid with interest as such rate as may be prescribed, 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 the agreement for sale".

22. Real Estate (Regulation and Development) Act, 2016, Section 18 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 or, as the case maybe duly completed by the date specified therein. Agreement for sale was only

for the sale of undivided share and the apartment was transferred along with the undivided share over the common areas to the complainants on 19/09/2017. 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 can be concluded that the complainant has voluntarily taken possession after transferring the apartment along with the undivided share to his name thereby exercising the option to continue with the project.

23. The complainant had filed petition for refund under section 18 of the Real Estate Regulation and Development Act only after the sale deed was executed in his favour, possession was handed over, electricity connection was obtained in his favour, and after the occupancy certificate was issued by the local body for the real estate project. It is also clear that the Complainant had received compensation for delayed delivery of the apartment before execution of the sale deed. For the aforementioned reasons, it is found that, the complaint under Section 18 for withdrawing from the real estate project claiming the return of the amount paid to the promoter with interest cannot be entertained.

Sd/-

Sri. M. P. Mathews

Member

COMPLAINT NO. 257/21

1. According to the complainant herein, on 14.03.2008, he had entered into an agreement for sale and a Memorandum of Agreement with the respondent for the construction of the apartment. It was submitted by the Complainant that an amount of Rs. 4,14,938/- was paid on 10.03.2008. The bank loan was disbursed on 23.05.2008 for an amount of Rs. 37,34,000/-. It was further submitted that as the work was not completed on time, there was a reallocation of apartment to flat No. 4102 in the 4th Block instead of flat No. 2091 in the 2nd Block, and that an amount of Rs. 1,61,897/- was paid towards service tax. The Respondents, after many excuses, informed that the apartment was ready for the occupation and instructed for registration of the sale deed. According to the Complainant, he informed the Respondents about deprivation of his financial benefits and he limited his losses to Rs. 3,87,548/- as matter of good gesture, but the Respondents gave only Rs. 2,20,920/- as compensation for delay. The Complainant submits that he paid registration charges of Rs. 1,11,000/- on 29.01.2016 and the Respondents registered the sale deed in his favour, and thereafter the Respondents handed over the key of the Apartment, but the possession was not given due to the reluctance in signing the affidavit as required by the respondent. The relief sought by the Complainant is a refund amount of Rs. 44,21,935/- along with interest at the rate of 14.15% from the date of payment to the date of actual repayment.

2. The Respondents submitted that the Complainants have received the title deed of the apartment No. 4102 on 24.03.2016 and taken possession, and were enjoying all the amenities. The sale deed of

apartment No. 4102 together with undivided share was executed on 29.01.2016 and the same was handed over to the Complainants on 24.03.2016. The Complainants have taken possession clearly endorsing that they are taking possession to their entire satisfaction of the construction. They have also executed an affidavit dated 18.10.2016 which is produced with the statement and marked as Exbt.B3. In the affidavit they have sworn that they have received an amount of Rs. 2,20,290 from the builder/Promotor towards full and final compensation for the delayed delivery of possession of their apartment.

3. It was argued by the Complainant's Counsel that they have executed an agreement for sale of undivided share of the property with the Respondent on 14.03.2008 along with an agreement for construction of the apartment No. 2091 in the 2nd Block after payment of 10% of the agreed amount. As per the agreement terms, the project was to be completed by December,2011. But the completion date mentioned by the builder in registration application is 23.03.2020. In between there was a reallocation of flat from the 2nd block to the 4th block with flat no. 4102. The Complainants allege that the Builder had cheated the allottees by collecting the full amount and without disclosing the illegalities involved in the project, executed the Sale Deed. And when there is specific clause in the agreement with regard to handing over possession, registration of the sale deed with specific mention about the status of the apartment shall not be a reason for the Authority to find that the Builder gave possession of the flat as per agreement. At the time of registration of the sale deed, the project did not even have a valid permit. The Building Permit was regularized only on 15/06/2016. By hiding all the illegalities and irregularities, the Builder fraudulently executed the Sale Deed in 2016 and the letter of key hand over.

Though the key of the flat is handed over to the Complainants, after execution of the letter, the Complainants came to know that the flat was not completed as promised. Hence, the Complainants are not occupying the flat. It was submitted that none of the evidence produced by Respondent is relevant or proves their case. The sale deed acknowledgment receipt produced was executed and collected by the builder himself. The Complainants were constrained to agree for signing the sanction letter, as they were misguided by the Respondents that the flat is ready for occupation. The Respondents were not ready to give possession of the flat as the Complainants were reluctant to sign the affidavit prepared by the Builder with completely wrong averments. However, the Complainants never occupied the flat even for a day.

4. The above complaint was heard by the full bench of the Authority along with the connected complaints. On the basis of the pleadings and arguments by both the parties, as detailed above, the Authority unanimously came to the same conclusion and decided to pass a common verdict but through different views and findings of (1) the Chairman & Member- Smt Preetha P Menon (2) Member- Sri. M P Mathews, in the following manner:

(1) Views & findings of Chairman & Member- Smt. Preetha P Menon

5. The documents produced by the complainant are marked as Exhibit A1 to A6 and the documents produced by the Respondents are marked as Exhibits B1 to B9. The Agreement for sale dated 14/03/2008 executed between Landowner represented by the 2nd Respondent who has

signed as authorized signatory for the promoter of the 1st Respondent company and the Complainant is produced and Memorandum of Agreement dated 14/03/2008 executed between the 1st Respondent and the Complainant is produced and marked as Exbt.A1 & A2 respectively. The lumpsum contract amount for the construction of the flat as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs. 39,18,822/-. The Promoter/ Respondent had also agreed to complete the entire construction of the flat/Residential complex within a period of 48 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stage payment without any default. The counsel for the Respondents argued that they have even made a payment of Rs. 2,20,290 as full and final compensation for the delay in handing over the apartment.

6. The consideration set forth in the sale deed dated 29/01/2016 is Rs 17,05,315 for 30.24 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in all that land having a total extent of 343.73 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4102 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 10th floor in the multi-storeyed building named 'Jain Tuffnell Gardens" and covered car park marked as No. 4102 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors. The entire sale consideration is stated to have been paid to the vendors who are the landowners and to the 1st Respondent. The copy of the sale deed dated 29/01/2016 is produced and marked as Exhibit A3. The sale deed was

executed in favour of the complainants transferring both the apartment and the undivided share over the common areas. It is admitted by the Complainant that after collecting the full payment, as per the direction of the 1st Respondent, the Complainant paid an amount of Rs. 1,11,100/- on 29/01/2016 towards registration charges and got the sale deed executed by the Respondent on 29.01.2016. Hence it is evident from the execution of the sale deed that the apartments were completed as per the terms of the agreement for sale. The copy of the electricity bill dated 26/11/2019 in the name of the Complainant is produced by the Respondent and marked as Exhibit B1. True copy of the Satisfaction letter dated 24.03.2016 is produced by the respondent and marked as Exhibit B2. True copy of the attested affidavit of Declaration dated 18.10.2016, is produced by the respondent and marked as Exhibit B3. It is evident from the above that the possession was handed over to the complainant after obtaining the above documents.

7. As far as other issues, raised by the learned counsel appeared for the Complainants, regarding violations in constructions or veracity of statutory sanctions are concerned they will come under the purview of local authority concerned which is the competent authority as per the Building Rules issuing Occupancy Certificate for such real estate projects. Here the copy of Occupancy Certificate is produced by the Respondents and marked as Exbt. B4. According to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the prescribed format. Occupancy certificate issued by the Secretary certifies that "the work executed is in accordance with the permit and the building is fit for occupation/use". As per the definition in the Real Estate Regulation

and Development Act, 2016, the "occupancy certificate" issued by the competent authority permits occupation of building as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. Considering the contention of the Counsel for the Complainant regarding violation of Section 14(1) of the Act 2016, as per the said provision, "*The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities*". Once the occupancy certificate is issued by the local body, it is to be presumed that the section 14(1) stands complied with and it presumes that all other statutory sanctions have been obtained for the project. Copy of Fire NOC dated 06.08.2020 obtained for the project is also produced by the Respondent which is marked as Exbt. B8. The project in question is a registered project before this Authority under section 3 of the Act, 2016 in which the date completion of the project is given as 31.05.2024. So, the statement of the Complainants' counsel that "the date of completion shown before the Authority is 23.03.2020" is false. Anyhow, this date has nothing to do with the Promised date of completion in the case of ongoing Real Estate Projects. As per the documents of registration with us, the Respondent/Promoter has registered only 2 blocks comprising a total floor area of 34,576 sq.m., as mentioned in the building permit. So, the Complainants could have raised such objections, with respect to issuance of any of such statutory approvals, right before the concerned Authority who issued such certificates. In the reply arguments, the learned counsel for the Respondent/Promoter submitted that the allottees approached the Hon'ble High Court of Kerala through writ petition No. 26935/2019 regarding the veracity of sanctions obtained for the construction and the Hon'ble High Court of Kerala on 23/01/2020 cautioned the petitioners that if they are proceeding with that writ, the same will be

dismissed with compensatory cost and subsequently the petition was dismissed as withdrawn.

8. The prayer in the Complaint is for direction to refund the amount paid by the Complainants along with interest as provided under Section 18(1) of the Real Estate (Regulation & Development) Act 2016. Section 18(1) of the Act 2016 specifies that *“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.”* As per Section 19(4) of the Act 2016, *“the allottee shall be entitled to claim the refund of the amount paid with interest at such rate as may be prescribed, 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 the agreement for sale”*.

9. Section 18(1) 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 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. Anyhow, the allottees cannot opt both the options together at any point of time. The Complainants who are literate persons could have very well objected/denied execution of Exbt. A3 sale deed and decided to withdraw from the project much earlier but no document has been placed before us to prove that they had intimated such a decision or unwillingness to the Respondent/Promoter. If at all, the Complainants are denied possession of the apartment by the Respondents, even after the execution of Exbt. A3 sale deed transferring the ownership and all the rights over the property, they have every right to approach appropriate judicial forum against the Respondents. At the same time, they were ready to sign Exhibit B2 satisfaction letter and Exhibit B3 Affidavit of Declaration, in favour of the Respondent/Promoter. In the Exbt B2 satisfaction letter dated 24/03/2016, it is stated by the Complainants that " We hereby agree and consent that on this day I have taken possession and keys of my flat to my entire satisfaction and we also state that all the clauses laid in the agreement by the promoters are also fulfilled in all respects to my satisfaction. In Exbt B3, Affidavit of Declaration also the Complainants confirmed that they have taken possession of the flat No. 4102 and they are satisfied with the construction and provisions of amenities as per the agreement and they have no claims regarding construction and amenities. The Respondent's Counsel vehemently argued that the Complainants were in possession of the apartment and were enjoying all the amenities provided in the project which is supported by Exhibit B1, B2, B3. In these circumstances, there is no reason for us to believe that even after execution and handing over the sale deed, possession was not handed over to the Complainants and the Complainants also failed to place on record any documents to corroborate their claim. Undoubtedly, the Complainants herein have not succeeded to

prove that the Respondent/Promoter failed to complete or unable to hand over possession of the apartment to the Complainants in accordance with the terms of the agreement for sale. . Hence it is found that the Complainants/allottees who obtained title and ownership over the apartment No. 4102 in Block 4 of the project from the Respondents/ Promoters are not eligible for withdrawing from the project and getting refund of the amount paid by them as per Section 18(1) of the Act 2016.

10. In view of the aforementioned facts and findings, it is found that the Complainants are not entitled to withdraw from the project at this stage and claim refund of the amount paid by them with interest as provided under Section 18 (1) of the Act 2016.

Sd/-
Smt. Preetha P Menon
Member

Sd/-
Sri. P H Kurian
Chairman

(2) Views & findings of Member- Sri. M P Mathews

11. After having heard the learned counsels for the parties and pursuing the documents produced the following issues emerged for consideration-

1. Whether the promoter has failed to complete the apartment in accordance with the terms of the agreement for sale by the date specified therein ?

2. Is the promoter unable to give possession of the apartment in accordance with the terms of the agreement for sale duly completed by the date specified therein?

3. Whether the complainants are entitled to get refund of the amount paid by them ?

12. Documents produced by the complainant are marked as Exhibit A1 to A6 and the documents produced by the respondents are marked as Exhibits B1 to B9. Ongoing through the documents produced by the allottees, it is seen that there is an Agreement for sale dated 14/03/2008 executed between Landowner represented by the 2nd Respondent who has signed as authorized signatory for the promoter of the 1st Respondent company and the Complainant is produced and marked as **Exhibit A1** and Memorandum of Agreement dated 14/03/2008 executed between the 1st Respondent and the Complainant is produced and marked as **Exhibit A2**. According to the Memorandum of Agreement, the complainant/allottee proposed to construct a flat in Block 4 mentioned in Schedule 'C' of the agreement. According to the Memorandum of Agreement, the complainant/allottee proposed to construct flat in Block 4 mentioned in Schedule 'C' of the agreement. According to the Memorandum of Agreement the promoter had agreed to construct one flat numbered 2091 in block No 2 on the 9th floor in the property referred to in the agreement for sale dated 14/03/2008 for purchase of undivided share out of schedule A property described in the schedule B referred to in the agreement. The lumpsum contract amount for the construction of the flat as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs. 39,18,822/-. It is referred to under clause 12 a) of the agreement that "Handing over of possession of the

constructions" shall mean handing over possession of the constructed super built space with standard specifications agreed upon and, in any context, does not cover the electrical, water, sewage and other service connections which are regulated by Government and other statutory bodies from time to time. It was also agreed that the common amenities and facilities, if any, proposed or to be proposed, shall be completed and handed over to the majority of the owners acting through a common body, after 3 months of handing over of possession in the project "Jain Tufnell Park" It was also agreed that non-completion of common amenities/facilities at the time of handing over possession of the individual flat/apartment shall not be a hindering or deterring factor for taking over of possession by the Complainant/Allottee and the promoter/ Respondent shall not be liable for any damages or payment of interest. The allottees/ Complainant agreed and confirmed that they shall not raise any claim, whatsoever in nature on that account. The Promoter/ Respondent had also agreed to complete the entire construction of the flat/Residential complex within a period of 48 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stage payment without any default. As per the Respondents, they have made a payment of Rs. 2,20,290 as full and final compensation for the delay.

13. The consideration set forth in the instrument dated 29/01/2016 is Rs 17,05,315 for 30.24 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in all that land having a total extent of 343.73 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4102 having a

super built-up area of 137.12 sq. mt in the Fourth Block on the 10th floor in the multi-storeyed building named 'Jain Tuffnell Gardens' and covered car park marked as No. 4102 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors 1 to 3 represented by the Power Of Attorney Holder/2nd Respondent and the 1st Respondent represented by the 2nd Respondent. The entire sale consideration is stated to have been paid to the vendors who are the landowners and to the 1st Respondent. The copy of the sale deed dated 29/01/2016 is produced and marked as **Exhibit A3**. The sale deeds were executed in favour of the complainants transferring both the apartment and the undivided share over the common areas. It is admitted by the Complainant that after collecting the full payment, as per the direction of the 1st Respondent, the Complainant paid an amount of Rs. 1,11,100/- on 29/01/2016 towards registration charges and got the sale deed executed by the Respondent on 29.01.2016. **Hence it is evident from the execution of the sale deed that the apartments were completed as per the terms of the agreement for sale.**

14. As per Sec. 19 (3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4. According to Clause 4(2)(1)(C) "The time period within which he undertakes to complete the project or phase thereof, as the case may be;" In the case of ongoing projects the time period within which the promoter undertake to complete the project is as given in the agreement executed between the complainant and the respondent before commencement of the Act, 2016. In Imperia

Structures Ltd. (M/s.) v. Anil Patni and Another (2020 KHC 6620), it is clarified that for the purposes of S.18, the period has to be reckoned in terms of the agreement and not the registration.

15. The copy of the electricity bill dated 26/11/2019 in the name of the Complainant is produced by the Respondent and marked as **Exhibit B1**. The Complainant has come up with a new allegation in the argument note which is extracted below "*The Complainants never took possession of the flat and the key of the flat is never handed over to the Complainants.*" True copy of the Satisfaction letter dated 24.03.2016 is produced by the respondent and marked as **Exhibit B2**. True copy of the attested affidavit of Declaration dated 18.10.2016, is produced by the respondent and marked as **Exhibit B3**. It is evident from the above that the possession was handed over to the complainant after obtaining the above documents. The allottees are entitled to claim possession of their apartment as per the declaration given by the promoter under section 4(2) (1) (C). In the case of ongoing project it is the time period mentioned in the agreement executed before the commencement of the Act, 2016. The electricity bill dated 26/11/2019 in the name of the complainant establishes the fact that the complainant was very much in possession of the apartment as he had submitted application to the KSEB and obtained electricity connection. **Therefore, it is confirmed that the complainant had taken possession, after execution of the sale deed in his favour by the Promoter/landowner on 29/01/2016.**

16. Occupancy Certificate received for the project was produced by the respondents and marked as **Exhibit B4**. This is not a

case where there is no prospect of either constructing flats or delivering the property to the complainants, and the citations quoted by the respondent have no relevance as far as this case is concerned. Handing over possession is defined in the agreement and based on the agreement for sale executed between the complainant and the respondent, the apartment and the undivided share over the common areas were transferred over after receiving consideration. As per Sec 23 of the Indian Contract Act the consideration and object of the agreement are Lawful.

17. As per section 19(10) every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building as the case may be. It is the duty of the allottee to take physical possession as per section 19(10), while it is the right of the allottee as per section 19(3) to claim possession of the apartment, plot, or building as the case may be. Here the allottee had taken possession of the apartment after execution of the sale deed exercising his right voluntarily, and just because possession was handed over the complainant is under no compulsion to start occupying the building. Usually after taking over possession of the building the interior works of the apartment are executed directly by the allottee and the respondent cannot be held responsible for the illegal occupation of the building before obtaining the occupancy certificate. The word "illegal" has an extensive meaning, including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for civil suit ending in damages. In this case the ownership and possession of the apartment enjoyed by the complainant cannot be considered as illegal possession. The apartment was handed over by the promoter to the allottee

after execution of the sale deed transferring the apartment as per the agreement for sale. From the consideration shown in the sale deed, agreements executed and the claim for reimbursement made by the complainants it is evident that the construction of the apartment was completed to the satisfaction of the complainants as per the agreements executed. It is therefore concluded that the apartments were completed as per the terms of the agreement for sale and possession was handed over.

18. All other issues of violations pointed out by the complainants are to be considered by the concerned local body that has issued the occupancy Certificate, or the forum that is seized of the matter. According to the definition in the Real Estate Regulation and Development Act, 2016, occupancy certificate issued by the competent authority permits occupation of building as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. According to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the form in Appendix H. Occupancy certificate issued by the Secretary certifies that the work executed is in accordance with the permit and the building is fit for occupation/use.

19. There was no compulsion on the complainant to take possession but the complainant is entitled to claim possession of the apartment under 19(3) of the Act, 2016. **When possession was handed over under 19(3) of the Act after execution of the sale deed transferring the apartment to the complainant, and the complainant is enjoying**

ownership and possession of the apartment in the real estate project withdrawal from the project cannot be considered under section 18 of the Act, 2016. A person who is put in possession of the property under an agreement for sale can only be evicted through the due process of law. It is accepted by the complainant that he is in possession of the property and the argument that it is illegal possession cannot be accepted by the authority when the complainant had taken possession on his own free will, after settling full payment and execution of sale deed in his favour.

20. Section 14(1) "The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities". Once the occupancy certificate is issued by the local body it is confirmed that the section 14(1) stands complied with. Occupancy certificate was issued on 07/10/2020 and the date of completion is shown in the occupancy certificate is 23/03/2020.

21. Real Estate (Regulation and Development) Act, 2016 Section 18 deals with return of amount and compensation S.18(1) "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”.

As per Section 19(4) the allottee shall be entitled to claim the refund of the amount paid with interest at such rate as may be prescribed, 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 the agreement for sale.

22. Section 18 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 or, as the case may be, duly completed by the date specified therein. Agreement for sale was only for the sale of undivided share and the apartment was transferred along with the undivided share over the common areas to the complainants on 29/01/2016. 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 can be concluded that the complainant has voluntarily taken possession after transferring the apartment along with the undivided share to his name thereby exercising the option to continue with the project.

23. The complainant had filed petition for refund under section 18 of the Real Estate Regulation and Development Act only after the sale deed was executed in his favour, possession was handed over,

electricity connection was obtained in his favour, and after the occupancy certificate was issued by the local body for the real estate project. It is also clear that the Complainant had received compensation for delayed delivery of the apartment before execution of the sale deed. For the aforementioned reasons, it is found that, the complaint under Section 18 for withdrawing from the real estate project claiming the return of the amount paid to the promoter with interest cannot be entertained.

Sd/-

Sri. M. P. Mathews
Member

COMPLAINT NO. 259/21

1. According to the complainant herein, on 04.03.2011, he had entered into an agreement for sale and a Memorandum of Agreement with the Respondents for the construction of the apartment. It was submitted by the complainant that an amount of Rs. 50,000/- was paid on 23.02.2011, Rs. 3,42,372/- on 04.03.2011, Rs. 1,38,970/ on 27.04.2011-, Rs. 9,63,144/-on 05.05.2011, Rs 7,34,743 on 31.05.2011, Rs. 7,34,743/ on 09.07.2011, Rs. 1,83,686/- on 31.10.2014, Rs. 1,84,662/- on 06.02.2015. It was further submitted that an amount of Rs. 59,704/- was paid on 06.02.2015 towards maintenance charges, and on 06.02.2015 Rs. 1,65,500/- as registration charges and the Respondents had executed the sale deed on 02.03.2015 and the Occupancy certificate was received on 07.10.2020. The relief sought by the Complainant is refund amount of Rs. 38,99,896/- along with interest at the rate of 14.15% from the date of payment to the date of actual repayment. The Respondents submitted that the Respondent, as directed by the Complainants, handed over the original sale deed to the bank.

The Complainants have taken possession and are occupying apartment No. 4075 and enjoying all the amenities including water, electricity, lift, housekeeping and security on the strength of the interim order dated 18.02.2019 in I A No. 159/2019 in CC No. 76/2018 of Hon'ble Consumer court, Thiruvananthapuram.

2. It was argued by the Complainant's Counsel that they have executed an agreement for sale of undivided share of the property with the respondent on 04.03.2011 along with an agreement for the construction of the apartment No. 4075 in the 4th Block after payment of 10% of the agreed amount. As per the agreement terms, the project was to be completed by May,2014. But the completion date mentioned by the builder in registration application is 23.03.2020. The Builder had cheated the allottees by collecting the full amount and without disclosing the illegalities involved in the project, executed the Sale Deed. And when there is specific clause in the agreement with regard to handing over possession, registration of the sale deed with specific mention about the status of the apartment shall not be a reason for the Authority to find that "Builder gave possession of the flat as per agreement". At the time of registration of the sale deed, the project did not even have a valid permit. The Building Permit was regularized only on 15/06/2016. By hiding all the illegalities and irregularities, the Builder fraudulently executed the Sale Deed in 2015. Many of the flat owners were coerced to sign affidavits to get the key of the flat whereas the Complainants herein were not ready to execute such affidavit and hence the key is still with the Builder. In short, the Complainants do not have 'possession of the apartment even to this day. It was submitted that none of the evidence produced by Respondent is relevant or proves their case. The sale deed acknowledgment receipt produced was executed and collected by the builder

himself. The complainant submitted that the order from the Consumer Court was obtained by playing fraud.

3. The above complaint was heard by the full bench of the Authority along with the connected complaints. On the basis of the pleadings and arguments by both the parties, as detailed above, the Authority unanimously came to the same conclusion and decided to pass a common verdict but through different views and findings of (1) the Chairman & Member- Smt. Preetha P Menon (2) Member- Sri. M P Mathews, in the following manner:

(1) Views & findings of Chairman & Member- Smt. Preetha P Menon

4. The documents produced by the complainant are marked as Exhibit A1 to A4 and the documents produced by the Respondents are marked as Exhibits B1 to B9. The Agreement for sale dated 04/03/2011 executed between Landowner represented by the 2nd Respondent who has signed as authorized signatory for the promoter of the 1st Respondent company and the Complainant is produced and marked as Exhibit A1. Memorandum of Agreement dated 04/03/2011 executed between the 1st Respondent and the Complainant is produced and marked as Exhibit A2. According to the Memorandum of Agreement the promoter had agreed to construct one flat numbered as 4075 in block No 4 on the 7th floor, in the property referred to in the agreement for sale dated 14/03/2008 for purchase of undivided share out of schedule A property described in the schedule B referred to in the agreement. The lumpsum contract amount for the construction of the flat as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs. 30,12,905/-. The

Promoter/ Respondent had also agreed to complete the entire construction of the flat/Residential complex within a period of 36 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stagewise payment without any default.

5. The consideration set forth in the Sale Deed dated 02/03/2015 is Rs 17,05,315/- for 30.93 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in all that land having a total extent of 351.53 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4075 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 7th floor in the multi-storeyed building named 'Jain Tuffnell Gardens' and covered car park marked as No. 4075 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors. The entire sale consideration is stated to have been paid to the vendors who are the landowners and to the 1st Respondent. The copy of the sale deed dated 02/03/2015 was produced by the complainant and marked as Exhibit A3. The sale deed was executed in favour of the complainants transferring both the apartment and the undivided share over the land. It is admitted by the Complainant that an amount of Rs. 1,65,500/- was paid on 13.04.2015 towards registration charges and got the sale deed executed by the Respondent on 02.03.2015. Hence it is evident from the execution of the sale deed that the apartments were completed as per the terms of the agreement for sale. The Complainant had approached the Hon'ble State Consumer Disputes Redressal Commission through Complaint No. 76/2018 and obtained an interim order in IA No.159/2019, as prayed for to ensure that the

common amenities enjoyed by the complainant are not cut off or denied by the Respondent. The IA was allowed vide order dated 18/02/2019 and the Respondents/Promoter and the Landowners were directed not to block/cut off the basic amenities like water and electricity connections provided with residential flat and not to discontinue the services like lift facility, cleaning and security services provided to the complainant and his family in the complex until further orders. The order dated 18/02/2019 of the Consumer State Commission has been produced by the Respondent and marked as Exhibit B1. Hence there is sufficient reason to believe that the key was handed over as the complainant after getting the sale deed executed in his favour and approached the consumer commission to ensure that his common amenities to the apartment were not cut off.

6. As far as other issues, raised by the learned counsel appeared for the Complainants, regarding violations in constructions or veracity of statutory sanctions are concerned they will come under the purview of local authority concerned which is the competent authority as per the Building Rules issuing Occupancy Certificate for such real estate projects. Here the copy of Occupancy Certificate is produced by the Respondents and marked as Exbt. B2. According to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the prescribed format. Occupancy certificate issued by the Secretary certifies that "the work executed is in accordance with the permit and the building is fit for occupation/use". As per the definition in the Real Estate Regulation and Development Act, 2016, the "occupancy certificate" issued by the competent authority permits occupation of building as provided under local

laws, which has provision for civic infrastructure such as water, sanitation and electricity. Considering the contention of the Counsel for the Complainant regarding violation of Section 14(1) of the Act 2016, as per the said provision, "*The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities*". Once the occupancy certificate is issued by the local body, it is to be presumed that the section 14(1) stands complied with and it presumes that all other statutory sanctions have been obtained for the project. Copy of Fire NOC dated 06.08.2020 obtained for the project is also produced by the Respondent which is marked as Exbt. B8. The project in question is a registered project before this Authority under section 3 of the Act, 2016 in which the date completion of the project is given as 31.05.2024. So, the statement of the Complainants' counsel that "the date of completion shown before the Authority is 23.03.2020" is false. Anyhow, this date has nothing to do with the Promised date of completion in the case of ongoing Real Estate Projects. As per the documents of registration with us, the Respondent/Promoter has registered only 2 blocks comprising a total floor area of 34,576 sq.m., as mentioned in the building permit. So, the Complainants could have raised such objections, with respect to issuance of any of such statutory approvals, right before the concerned Authority who issued such certificates. In the reply arguments, the learned counsel for the Respondent/Promoter submitted that the allottees approached the Hon'ble High Court of Kerala through writ petition No. 26935/2019 regarding the veracity of sanctions obtained for the construction and the Hon'ble High Court of Kerala on 23/01/2020 cautioned the petitioners that if they are proceeding with that writ, the same will be dismissed with compensatory cost and subsequently the petition was dismissed as withdrawn.

7. The prayer in the Complaint is for direction to refund the amount paid by the Complainants along with interest as provided under Section 18(1) of the Real Estate (Regulation & Development) Act 2016. Section 18(1) of the Act 2016 specifies that *"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."* As per Section 19(4) of the Act 2016, *"the allottee shall be entitled to claim the refund of the amount paid with interest at such rate as may be prescribed, 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 the agreement for sale"*.

8. Section 18(1) 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 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. Anyhow, the allottees cannot opt both the options together at any point of time. The Complainants who are literate persons could have very well objected/denied execution of Exbt.A3 sale deed and decided to withdraw from the project much earlier but no document has been placed before us to prove that they had intimated such a decision or unwillingness to the Respondent/Promoter. If at all, the Complainants are denied possession of the apartment by the Respondents, even after the execution of Exbt. A3 sale deed transferring the ownership and all the rights over the property, they have every right to approach appropriate judicial forum against the Respondents. At the same time, the Complainants here obtained the Exbt B1 interim order from the Consumer Commission in their favour which shows that they are enjoying the common amenities and facilities. They also signed Exhibit B9 customer satisfaction report in favour of the Respondent/Promoter. The Respondent's Counsel vehemently argued that the Complainants were in possession of the apartment and were enjoying all the amenities provided in the project. In these circumstances, there is no reason for us to believe that even after execution and handing over the sale deed, possession was not handed over to the Complainants and the Complainants also failed to place on record any documents to corroborate their claim. Undoubtedly, the Complainants herein have not succeeded to prove that the Respondent/Promoter failed to complete or unable to hand over possession of the apartment to the Complainants in accordance with the terms of the agreement for sale. Hence it is found that the Complainants/allottees who obtained title and ownership over the apartment No. 4075 in Block 4 of the project from the Respondents/ Promoters are not eligible for withdrawing from the project and getting refund of the amount paid by them as per Section 18(1) of the Act 2016.

9. In view of the aforementioned facts and findings, it is found that the Complainants are not entitled to withdraw from the project at this stage and claim refund of the amount paid by them with interest as provided under Section 18 (1) of the Act 2016.

Sd/-
Smt. Preetha P Menon
Member

Sd/-
Sri. P H Kurian
Chairman

(2) Views & findings of Member- Sri . M P Mathews

10. After having heard the learned counsels for the parties and pursuing the documents produced the following questions emerge for consideration

11. Whether the promoter has failed to complete the apartment in accordance with the terms of the agreement for sale by the date specified therein ?

12. Is the promoter unable to give possession of the apartment in accordance with the terms of the agreement for sale duly completed by the date specified therein?

13. Whether the complainants are entitled to get refund of the amount paid by them ?

11. Documents produced by the complainant are marked as Exhibit A1 to A4 and the documents produced by the

respondents are marked as Exhibits B1 to B10. Ongoing through the documents produced by the allottees, it is seen that there is an Agreement for sale dated 04/03/2011 executed between Landowner represented by the 2nd Respondent who has signed as authorized signatory for the promoter of the 1st Respondent company and the Complainant is produced and marked as **Exhibit A1**. Memorandum of Agreement dated 04/03/2011 executed between the 1st Respondent and the Complainant is produced and marked as **Exhibit A2**. According to the Memorandum of Agreement the promoter had agreed to construct one flat numbered as 4075 in block No 4 on the 7th floor, in the property referred to in the agreement for sale dated 14/03/2008 for purchase of undivided share out of schedule A property described in the schedule B referred to in the agreement. The lumpsum contract amount for the construction of the flat as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs. 30,12,905/- . It is referred to under clause 12 a) of the agreement that "Handing over of possession of the constructions" shall mean handing over possession of the constructed super built space with standard specifications agreed upon and, in any context, does not cover the electrical, water, sewage and other service connections which are regulated by Government and other statutory bodies from time to time. It was also agreed that the common amenities and facilities, if any, proposed or to be proposed, shall be completed and handed over to the majority of the owners acting through a common body, after 3 months of handing over of possession in the project "Jain Tufnell Park" It was also agreed that non-completion of common amenities/facilities at the time of handing over possession of the individual flat/apartment shall not be a hindering or deterring factor for taking over of possession by the Complainant/Allottee and the promoter/ Respondent shall not be liable for any damages or payment of interest. The allottees/

Complainant agreed and confirmed that they shall not raise any claim, whatsoever in nature on that account. The Promoter/ Respondent had also agreed to complete the entire construction of the flat/Residential complex within a period of 36 months from the date of starting the construction with a grace period of three months and they agreed to compensate the Complainant/Allottee @ Rs. 6/- per sq.ft per month in case of any delay in construction beyond the above stipulated period provided the Allottee makes the stagewise payment without any default. No compensation is seen given in this case.

12. The consideration set forth in the instrument dated 02/03/2015 is Rs 17,05,315/- for 30.93 Square meters equivalent to 0.088% undivided and indivisible right, title, and interest in all that land having a total extent of 351.53 Ares, together with exclusive ownership, right, title and interest in the said apartment No. 4075 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 7th floor in the multistoried building named 'Jain Tuffnell Gardens" and covered car park marked as No. 4075 together with all easements and corresponding right to use all common amenities and facilities and all other rights therein obtained by the vendors 1 to 3 represented by the Power Of Attorney Holder/2nd Respondent and the 1st Respondent represented by the 2nd Respondent. The entire sale consideration is stated to have been paid to the vendors who are the landowners and to the 1st Respondent. The copy of the sale deed dated 02/03/2015 was produced by the complainant and marked as **Exhibit A3**. The sale deeds were executed in favour of the complainants transferring both the apartment and the undivided share over the common areas, before the Real Estate Regulation and Development Act was in force. It is

admitted by the Complainant that an amount of Rs. 1,65,500/- was paid on 13.04.2015 towards registration charges and got the sale deed executed by the Respondent on 02.03.2015. **Hence it is evident from the execution of the sale deed that the apartments were completed as per the terms of the agreement for sale.**

13. Sec. 19 (3) the Kerala (Regulations & Development Act,2016) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4. According to Clause 4(2)(I)(C) "The time period within which he undertakes to complete the project or phase thereof, as the case may be;" In the case of ongoing projects the time period within which the promoter undertake to complete the project is as given in the agreement executed between the complainant and the respondent before commencement of the Act, 2016. In Imperia Structures Ltd. (M/s.) v. Anil Patni and Another (2020 KHC 6620), it is clarified that for the purposes of S.18, the period has to be reckoned in terms of the agreement and not the registration.

14. The Complainant had approached the Hon'ble State Consumer Disputes Redressal Commission through Complaint No. 63/2018 and obtained an interim order in IA No.152/2019, as prayed for to ensure that the common amenities enjoyed by the complainant are not cutoff or denied by the respondent. The IA was allowed vide order dated 18/02/2019 and the Respondents/Promoter and the Landowners were directed not to block/cut off the basic amenities like water and electricity

connections provided with residential flat No. 4091 and not to discontinue the services like lift facility, cleaning and security services provided to the complainant and his family in the complex until further orders. The order dated 18/02/2019 of the Consumer State Commission has been produced by the Respondent and marked as **Exhibit B1**. There is sufficient reason to believe that the key was handed over as the complainant approached the consumer commission to ensure that his common amenities to the apartment were not cut off. The prayer as such was allowed by the Consumer Commission based on the submissions of the complainant. The complaint was dismissed as withdrawn on 01/10/2021, by the Hon'ble Consumer Commission. The allottees are entitled to claim possession of their apartment as per the declaration given by the promoter under section 4(2) (l) (C). In the case of ongoing project it is the time period mentioned in the agreement executed before the commencement of the Act, 2016. It is also confirmed by the Consumer Court order produced by the respondent that the basic amenities were enjoyed by the complainant in his apartment. **Therefore, it is confirmed that the complainant had taken possession, after execution of the sale deed in his favour by the Promoter/landowner on 25/10/2015.**

15. Occupancy Certificate received for the project was produced by the respondents and marked as **Exhibit B2**. This is not a case where there is no prospect of either constructing flats or delivering the property to the complainants, and the citations quoted by the respondent have no relevance as far as this case is concerned. Handing over possession is defined in the agreement and based on the agreement for sale executed between the complainant and the respondent, the apartment and the undivided share over the common areas were transferred over after

receiving consideration. As per Sec 23 of the Indian Contract Act the consideration and object of the agreement are Lawful.

16. As per section 19(10) every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building as the case may be. It is the duty of the allottee to take physical possession as per section 19(10), while it is the right of the allottee as per section 19(3) to claim possession of the apartment, plot, or building as the case may be. Here the allottee had taken possession of the apartment after execution of the sale deed exercising his right voluntarily, and just because possession was handed over the complainant is under no compulsion to start occupying the building. Usually after taking over possession of the building the interior works of the apartment are executed directly by the allottee and the respondent cannot be held responsible for the illegal occupation of the building before obtaining the occupancy certificate. It is evident that the complainant was in possession of his apartment before the occupancy certificate was obtained, from the interim order of the Consumer Court in the year 2019. The word "illegal" has an extensive meaning, including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for civil suit ending in damages. In this case the ownership and possession of the apartment enjoyed by the complainant cannot be considered as illegal possession. The apartment was handed over by the promoter to the allottee after execution of the sale deed transferring the apartment as per the agreement for sale. From the consideration shown in the sale deed, agreements executed and the claim for reimbursement

made by the complainants it is evident that the construction of the apartment was completed to the satisfaction of the complainants as per the agreements executed. It is therefore concluded that the apartments were completed as per the terms of the agreement for sale and possession was handed over.

17. All other issues of violations pointed out by the complainants are to be considered by the concerned local body that has issued the occupancy Certificate, or the forum that is seized of the matter. According to the definition in the Real Estate Regulation and Development Act, 2016, occupancy certificate issued by the competent authority permits occupation of building as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. According to Rule 22(3) of Kerala Municipality and Building Rules the secretary shall on receipt of the completion certificate and on being satisfied that the construction is in conformity with the permit given, issue occupancy certificate in the form in Appendix H. Occupancy certificate issued by the Secretary certifies that the work executed is in accordance with the permit and the building is fit for occupation/use.

18. There was no compulsion on the complainant to take possession but the complainant is entitled to claim possession of the apartment under 19(3) of the Act, 2016. **When possession was handed over under 19(3) of the Act after execution of the sale deed transferring the apartment to the complainant, and the complainant is enjoying ownership and possession of the apartment in the real estate project withdrawal from the project cannot be considered under section 18 of the Act, 2016.** A person who is put in possession of the property under an

agreement for sale can only be evicted through the due process of law. It is accepted by the complainant that he is in possession of the property and the argument that it is illegal possession cannot be accepted by the authority when the complainant had taken possession on his own free will and even approached the Consumer Court and obtained an order restraining the respondent from disconnecting the common amenities like water and electricity.

19. Section 14(1) "The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans, and specifications as approved by the competent authorities". Once the occupancy certificate is issued by the local body it is confirmed that the section 14(1) stands complied with. Occupancy certificate was issued on 07/10/2020 and the date of completion is shown in the occupancy certificate is 23/03/2020.

20. Real Estate (Regulation and Development) Act, 2016 Section 18 deals with return of amount and compensation S.18(1) "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”.

As per Section 19(4) the allottee shall be entitled to claim the refund of the amount paid with interest as such rate as may be prescribed, 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 the agreement for sale.

21. Section 18 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 or, as the case maybe duly completed by the date specified therein. **Agreement for sale was only for the sale of undivided share and the apartment was transferred along with the undivided share over the common areas to the complainants on 02/03/2015.** 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 can be concluded that the complainant has voluntarily taken possession after transferring the apartment along with the undivided share to his name thereby exercising the option to continue with the project.

22. The complainant had filed petition for refund under section 18 of the Real Estate Regulation and Development Act only after the sale deed was executed in his favour, possession was handed over, and after the occupancy certificate was issued by the local body for the real estate

project. It is also clear that the Complainant was enjoying the common amenities and had approached the consumer forum to ensure that the same are not cut off by the Respondents. For the aforementioned reasons, it is found that, the complaint under Section 18 for withdrawing from the real estate project claiming the return of the amount paid to the promoter with interest cannot be entertained.

Sd/-

Sri. M. P. Mathews

Member II

ORDER OF THE AUTHORITY

In view of the aforementioned facts and findings, it is found unanimously by the Authority that the Complainants in the above 4 complaints are not entitled to withdraw from the project at this stage and claim refund of the amount paid by them with interest as provided under Section 18 (1) of the Act 2016. In the result, the Complaints No. 254/2021, 255/2021, 257/2021 & 259/2021 are hereby dismissed. Both parties shall bear their respective costs.

The Complainants, who did not receive any interest/compensation so far from the Respondents, are at liberty to approach this Authority for getting interest for delay, occurred in getting possession of

their apartment from the Respondents and the Adjudicating Officer of this Authority for getting compensation as provided under the Act & Rules.

Sd/-	Sd/-	Sd/-
Smt. Preetha P Menon Member	Sri M.P Mathews Member	Sri. P H Kurian Chairman

/True Copy/Forwarded By/Order/


Secretary (Legal)

EXHIBITS

List of Documents in Complaint No. 254/21- Complainant side

- Exhibit A1- True copy of the Agreement for Sale dated 10.03.2008.
- Exhibit A2 - True copy of the Memorandum of Agreement dated 10.03.2008
- Exhibit A3 - True copy of the Sale Deed dated 25/10/2015.
- Exhibit A4 - True copy of the order passed by the Real Estate Appellate Tribunal in REFA No. 26/2021 dated 02.09.2021.
- Exhibit A5- True Copy of the Power of Attorney executed by the Complainants in the name of Mr. K. R Krishnan.

- Exhibit A6 series- True copy of the Receipts of payments made.
- Exhibit A7- True copy of the letter showing the loan payment issued by SBI
- Exhibit A8- True copy of the Environmental clearance Application submitted by Respondents dated 03.11.2010.
- Exhibit A9- True copy of the Environmental clearance issued by MoEF to the Respondents dated 24.05.2011.

List of Documents in Complaint No. 254/21- Respondent side

- Exhibit B1- True copy of the Electricity bill in the name of the Complainant dated 26/11/2019
- Exhibit B2- True copy of the Order passed by Consumer State , Thiruvananthapuram dated 18/02/2019
- Exhibit B3- True copy of the Occupancy Certificate dated 07/10/2020.
- Exhibit B4- True copy of the Completion Certificate dated No. 25.05.2013 issued by Chartered Engineer.
- Exhibit B5- True copy of the Order dated 26935 of 2019 in Writ Petition No. 23/01/2020
- Exhibit B6- True copy of certificate issued from Thrikkakkara Grama Panchayat dated 31/08/2006 & 09/09/2008.
- Exhibit B7- True copy of the Partial Occupancy Certificate dated 26/07/2016.
- Exhibit B8- True copy of the Fire NOC dated 06/08/2020 in the name of the Promoter.

List of Documents in Complaint No. 255/21- Complainant side

- Exhibit A1- True copy of the Agreement for Sale dated 10.03.2008.
- Exhibit A2- True copy of the Memorandum of Agreement dated 10.03.2008
- Exhibit A3- True copy of the Sale Deed dated 19/09/2017.
- Exhibit A4 series- True copy of the Receipts of payments made.

List of Documents in Complaint No. 255/21- Respondent side

- Exhibit B1- True copy of the Electricity bill in the name of the Complainant dated 26/11/2019
- Exhibit B2- True Copy of the Email correspondence from 03/06/2017 to 27/07/2017
- Exhibit B3- True copy of the Occupancy Certificate dated 07/10/2020.
- Exhibit B4- True copy of the Completion Certificate dated No. 25.05.2013 issued by Chartered Engineer.
- Exhibit B5- True copy of the Order dated 26935 of 2019 in Writ Petition No. 23/01/2020.
- Exhibit B6- True copy of certificate issued from Thrikkakkara Grama Panchayat dated 31/08/2006 & 09/09/2008.
- Exhibit B7- True copy of the Partial Occupancy Certificate dated 26/07/2016.
- Exhibit B8- True copy of the Fire NOC dated 06/08/2020 in the name of the Promoter.

List of Documents in Complaint No. 257/21- Complainant side

- Exhibit A1- True copy of the Agreement for Sale dated 14.03.2008.
- Exhibit A2- True copy of the Memorandum of Agreement dated 14.03.2008.
- Exhibit A3- True copy of the Sale Deed dated 29/01/2016.
- Exhibit A4 series- True copy of the Receipts of payments made.
- Exhibit A5- True Copy of the tripartite agreement dated 27.07.2009.
- Exhibit A6- Supplementary Agreement for Re-allotment of the flat dated 11.02.2010.

List of Documents in Complaint No. 257/21- Respondent side

- Exhibit B1- True copy of the Electricity bill in the name of the Complainant dated 26/11/2019.
- Exhibit B2- True copy of the Satisfaction letter dated 24.03.2016
- Exhibit B3- True copy of the attested affidavit of Declaration dated 18.10.2016.
- Exhibit B4- True copy of the Occupancy Certificate dated 07/10/2020.
- Exhibit B5- True copy of the Completion Certificate dated No. 25.05.2013 issued by Chartered Engineer.
- Exhibit B6- True copy of the Order dated 26935 of 2019 in Writ Petition No. 23/01/2020

- Exhibit B7- True copy of the NOC from Thrikkakkara Grama Panchayat dated 31/08/2006 & 09/09/2008
- Exhibit B8- True copy of the Partial Occupancy Certificate dated 26/07/2016.
- Exhibit B9- True copy of the Fire NOC dated 06/08/2020 in the name of the Promoter.

List of Documents in Complaint No. 259/21- Complainant side

- Exhibit A1- True copy of the Agreement for Sale dated 04/03/2011.
- Exhibit A2- True copy of the Memorandum of Agreement dated 04.03.2011.
- Exhibit A3- True copy of the Sale Deed dated 02/03/2015.
- Exhibit A4 series- True copy of the Receipts of payments made.

List of Documents in Complaint No. 259/21- Respondent side

- Exhibit B1- True copy of the order dated 18/02/2019 in I A No. 159/2019 in CC No. 76/2018 from the Hon'ble Consumer State Commission.
- Exhibit B2- True copy of the Occupancy Certificate dated 07/10/2020.
- Exhibit B3- True copy of the Completion Certificate dated No. 25.05.2013 issued by Chartered Engineer.
- Exhibit B5- True copy of the Order of Hon'ble High Court in Writ Petition No.26935 of 2019 dated 23/01/2020.

- Exhibit B6- True copy of the NOC from Thrikkakkara Grama Panchayat dated 31/08/2006 & 09/09/2008
- Exhibit B7- True copy of the Partial Occupancy Certificate dated 26/07/2016.
- Exhibit B8- True copy of the Fire NOC dated 06/08/2020 in the name of the Promoter.
- Exhibit B9- True copy of Customer satisfaction Report dated 25/09/2017.