



KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint Nos. 274/21

Present: Sri. P. H Kurian, Chairman

Dated 26th July, 2022

Complainant

K M Mathew
G-153, Panampilly Nagar,
Kochi- 682036

Respondents

1. M/s Asten Properties and Developers Pvt Ltd,
Represented by its Director Siraj Mather
28, Asten, 2nd Floor, N H By pass,
Palarivattom, Vennala P O, Kochi- 682032
2. Siraj Mather
33/29 A, Promenade, Pavor Road,
Padivattom, Edapally P O
Kochi- 682032
3. Kakkanattil Raffi Mather Ibrahimkutty
Director, Asten Properties and Developers Pvt Ltd.
28, Asten, 2nd Floor, N H By pass ,
Palarivattom,
Vennala PO, Kochi- 682032
4. Kakanatil Mohammed Zuhair Mather Siraj
Director, Asten Properties and Developers Pvt Ltd



28, Asten, 2nd Floor, N H By pass ,
Palarivattom,
Vennala PO, Kochi- 682032

The Counsel for the Complainant Adv. P K X Kuncheria and Adv. Praveen K Joy attended the virtual hearing on 15/06/2022 and taken for final orders on 25/06/2022.

ORDER

1. The facts of the case are as follows- The Complainant is an allottee of the Project "Dew Dale" situated at Kanjirapally developed by the Respondents. The Complainants entered into a Land Agreement and a Construction agreement both dated 11.07.2012 with the Respondent for purchasing the 1402/1,00,000 % undivided share of land having an extent of 52.169 Ares along with Apartment No. 10B on the Tenth-Floor admeasuring 160.41 Sq. mts together with a covered parking area. The project was to be completed with all construction within 26 months from the date of execution of the said Agreement i. e within 11th September,2014. The project was not completed on time and the Complainants entered into Deed of Addendum of Land Agreement and Construction Agreement, both dated 24.10.2014 to rectify the setback and inaccuracies of the Principal Deed of 2012. As per these new agreements, the total sale consideration enhanced from Rs. 58,15,335/- to Rs. 69,63,048/-, and changed the allotted Apartment from 10B to Apartment No. 10C and area from 160.41 Sq.mts to 193.70 Sq.mts. The construction was to be completed within 27 months of the date of execution of these agreements i.e within 24th January,2017. As per the agreements dated 24.10.2014, the Builder/Vendor agreed for liquidated damages if the possession is not handed over within 16 weeks from the commitment period, that is 24 January,2017, the liquidated damages agreed was Rs. 53.80 per Sq. mt per month for the 193.70 sq. mts. In spite of repeated oral request made



by the Complainant to the Respondent, and request in writing for the liquidated damages, no response was received and it is 84 months past the due date. The Complainant has fully paid an amount of Rs. 61,55,554/- as per the schedule of payments and as requested by the Respondent/builder. The project was to be completed on 11.09.2017 as per the new agreement and now the Respondents had unilaterally decided and proclaimed for Registration of the Project with the Kerala Real Estate Regulatory Authority that the project will be completed by 30.12.2027. The relief sought for by the Complainant is for refund of Rs. 61,55,554/- paid fully under Section 12 and Section 18 of the Act,2016, together with interest @ 14.15% as applicable under Rule 18 of Rules,2018 from 24.01.2017, liquidated damages as per the agreement for 84 months -Rs. 8,75,369/- and compensation.

2. The Respondents filed written statement and submitted that the Complaint is not maintainable and this cannot be entertained by this Authority as the remedy of the Complaint lies elsewhere. The Respondents have informed the Complainants about the delay being occurred in the completion of the building and it was also informed that the structural work is over and the completion of the project work is getting delayed only for reasons beyond the control of the Respondents. The completion of the project was rescheduled and it was proposed to be completed within time. There is no deficiency in service on the Respondents and all the averments are denied by the respondents. The Complainants have not yet paid the balance amount as per the payment schedule. The agreements executed between the Complainants and Respondents have the arbitration clause and both the parties are bound to attend in this regard. The project was in the final stage and due to flood and covid restrictions, there was a slight delay to hand over the flat. The Complainant requested the Respondents to continue with the project and completion of the project. The



delay that occurred was beyond the control of the Respondents. The Respondents had already invested a huge amount in the completion of the project. Thus, the petition before the Authority is not maintainable, without the balance amount being paid. It was submitted that the petitioner has not even paid the 50% of the amount. The extension agreement was entered by the Complainants fully knowing the circumstances under which the works could not be finished as per the original agreement. The right course to resolve the dispute between the Complainant and Respondents shall be through arbitration and not otherwise in lieu of the arbitration. It is specifically contended that the Complaint cannot be adjudicated by this Authority as there is an arbitration clause in the agreement. The Act came into force in the year 2016 and the agreement was executed in the 2015 with the arbitration clause which was admitted by the Complainant also. It was held in AIR 2006 SC 2800 that when application is submitted before the 1st Statement on the substance of dispute, then the Court has to immediately invoke the Arbitration clause and refer the dispute for Arbitration. The Complaint is hit by Arbitration and Conciliation Act. It is well settled law that the Kerala Real Estate (Regulation & Development) Act, 2016 have no retrospective effect. The Authority has no jurisdiction to entertain the matter due to the agreement clause. The grievance was with regard to bathroom tile or other aspects. As the completion of the building is an admitted fact, the handing over is under process. The Respondents prayed that the Complaint may be dismissed.

3. The Complainant filed rejoinder to the written statement and submitted that it is very clear from the Act, 2016 and the decisions of the Supreme Court of India, especially in *Newtech Promoters and Developers Pvt Ltd vs State of UP* dated 11th November, 2021, that the jurisdiction of the Authority in all aspects under consideration are firmly declared. It was submitted that the 50% of the completion work is still



pending. The updates given by the Respondents on the Authority website make it clear that the Project is nowhere near the completion stage. The amount pending to be paid is the amount that was set apart as the registration charges, stamp duty, related charges etc. The facts of flood and pandemic came many years after the due date for completion of the Project. The Project was to be completed on 24th January 2017, as per the revised deed of addendum dated 24th October 2014.

4. The documents produced from the part of the Complainant are marked as Exhibits.A1 to A6 and no documents produced from the part of the Respondents. The Complainants produced the Land Agreement dated 11/07/2012 executed between that the Complainant and Respondent/ Builder which is marked as **Exhibit A1**. Both the parties entered into a construction agreement on the same day for constructing an apartment No. 10B on the 10th Floor in the proposed building named “Dew Dale” on the land described in Schedule B of the agreement admeasuring area of 1726 Sq. ft and one covered car parking. The copy of the Construction agreement is produced and marked as **Exhibit A2**. The completion date mentioned in the agreement is 26 months from the date of the agreement. As the Respondent/Builder was not able to keep the promise on time, both the parties have mutually executed a deed of Addendum for both land and Construction dated 24/10/2014 for extension of completion date and other changes. The copies of the same are produced and marked as **Exhibits A3 & A4**.

5. Upon hearing the arguments of the learned counsels of either side and on perusal of the documents available, the following issues came up for consideration:



1) Whether the Respondent/Promoter failed to complete the apartment in accordance with the terms of the agreement for sale or duly completed by the date specified therein or not?

2) Whether the Complainant herein is entitled to withdraw from the project at this stage and claim a refund of the amount paid with interest as provided under Section 18 (1) of the Act 2016 or not?

3) What order as to costs?

6. The relief sought in the Complaint is for direction to refund the amount paid by the Complainant 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". It is obvious that 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.

7. The Respondents argued that this Authority has no jurisdiction to entertain this case as the agreements executed between the parties consist of an arbitration clause which states that any disputes arising out of the terms of the agreement shall be put to mediation and if not settled shall be referred to the Arbitrator for Arbitration. The Respondent also argued that as the Exhibit A4 agreement was executed before the Act, 2016 and this complaint has to be referred for Arbitration. The Real Estate Regulatory Authority (Authority) was created by Parliament in each state for the protection of the consumers and also for the regulation and promotion of the real estate sector. In a decision on *Ganesh Lonkar v DS Kulkarni Developers Ltd*, the Maharashtra Real Estate Authority (MahaRERA) has taken the view that, despite the existence of an arbitration clause in the agreement between the parties, it has the jurisdiction to adjudicate disputes that are the subject of the arbitration agreement. The legislature is presumed to be aware of all laws enacted by it; as RERA was enacted after the Arbitration and Conciliation Act, 1996 (ACA), RERA would prevail over ACA. The Parliament has bestowed on the right of the allottee in a project to withdraw from the project and seek a refund under section 18 of the Act, 2016.



8. It is an admitted fact that the construction is still in progress and the Promoter has failed to complete the Project as promised and he is unable to even commit a date for handing over possession of the apartment. As per the agreement executed between Promoter and Complainant, it is stated in clause 16 of the Deed of Addendum of Construction as below “the Builder undertakes to ensure that the said construction is completed within 27 months, subject to the client fulfilling his obligations as per the agreement and also subject to the situation arising out of factors beyond the control of the builder and force majeure”. It was further mentioned that the handing over will be done within 30 days after completion or after receipt of the entire payment by the allottee. It is therefore clear that the apartment was to be handed over as per the agreement on or before 24.01.2017. The Project is registered under sec 3 of the Act,2016 and the completion date mentioned in the certificate is 31.12.2027, by the promoter and hence it is evident that the Project is nowhere near completion. The Authority has perused the quarterly update under section 11(1) of the Act,2016, by the Promoter/ Respondent on the Authority website and found that only about 50% of the work is completed so far as per the last update dated 04/06/2022.

9. It is clear that the Respondent has not been able to complete the construction on the agreed date and the handover of possession of the apartment to date. There is nothing on record that there were factors beyond the control of the Promoter that delayed the Project beyond 24.01.2017. The inordinate delay in completing the construction as promised by 24.01.2017 and the uncertainty of completion of the Project have bestowed upon the right of the allottee under Section 18 of the Act to withdraw from the Project and demand a return of the amount paid by him in respect of



that apartment with interest as prescribed under Rule 18 of the Kerala Real Estate (Regulation and Development) Rules, 2018.

10. On the basis of the aforementioned fact and findings, it is evident that the possession of the apartment has not been handed over to the Complainant as promised in the agreement and the sale deed has not been executed. No documents have been produced by the Respondents to prove that they intimated the completion of the apartments or issuance of occupancy certificate for the project or demanding balance payment/registration charges for the sale deed registration. The Complainant has a specific case that he originally booked the apartment in the year 2012, the payment as per the schedule has been made and it is found that the Respondent/Promoter has failed to complete and hand over possession of the apartment to the Complainant/allottee as promised and therefore the Complainant/allottee is entitled to withdraw from the project and get refunded the amount paid by him to the Respondent/Promoter along with interest. Points No. 1&2 are answered accordingly in favour of the Complainant herein. All the other averments and allegations (including liquidated damages) stated by both the parties cannot be entertained by the Authority.

11. The Complainant has produced Receipts of payments for Rs.61,55,554/- made to the Respondents which are marked as Exhibits A5 series. Anyhow, the Respondents have not raised any objection on the said documents. Details of payments made, as confirmed by the Authority based on the above documents are as detailed below:



<u>Date</u>		<u>Amount</u>
14/06/2012	-	Rs.1,00,000/-
12/07/2012	-	Rs.15,23,108/-
04/07/2014	-	Rs.9,68,688/-
30/07/2015	-	Rs.6,47,956/-
12/09/2015	-	Rs.6,47,956/-
26/10/2015	-	Rs.6,47,956/-
17/11/2015	-	Rs.3,23,978/-
28/10/2016	-	Rs.3,23,978/-
16/03/2016	-	Rs.3,23,978/-
03/06/2016	-	Rs.3,23,978/-
25/11/2016	-	Rs.3,23,978/-
Total	-	Rs. 61,55,554/-

12.

Hence, the Complainant herein is entitled to get the refund of the above-mentioned amount along with interest and the Respondent is liable to refund the amount to the complainant along with the interest. As per Rule 18 of Kerala Real Estate (Regulation & Development) Rules 2018, the rate of interest payable by the Promoter shall be State Bank of India's Benchmark Prime Lending Rate Plus Two Percent and shall be computed as simple interest. The Complainant had claimed a refund of Rs.61,55,554/- paid by him along with interest at the rate of 14.15% per annum from the date of each payment to the date of actual repayment. Hence it is found that Respondents 1 and 2 are liable to refund Rs.61,55,554/- along with 14.15 % (12.15 current BPLR rate +2) simple interest from the date of each payment as scheduled above.



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

1) The Respondents No. 1 & 2 shall return the amount of Rs.61,55,554/- to the Complainant along with interest @ 14.15% simple interest per annum from the date of each payment till the date of realization.


2) If the Respondent fails to pay the aforesaid sum as directed above within a period of 60 days from the date of receipt of this order, the Complainant is at liberty to recover the aforesaid sum from the Respondent's 1 & 2 and their assets by executing this decree in accordance with the Real Estate (Regulation & Development) Act and Rules.

Both parties are directed to bear their respective costs.

Sd/-
P H Kurian
Chairman

Shah

/True Copy/Forwarded By/Order/


Secretary (Legal)

Exhibits

Exhibits from the Complainant side

1. Exhibit A1- True copy of the Deed of Land Agreement dated 11.07.2012
2. Exhibit A2- True copy of the Deed of Construction Agreement dated 11.07.2012
3. Exhibit A3- True copy of the Deed of Addendum of Land Agreement dated 24.10.2014
4. Exhibit A4- True copy of the Deed of Addendum of Construction Agreement dated 24.10.2014.
5. Exhibit A5- True copy of the Request letter dated 26.03.2019.
6. Exhibit A6- True copy of the Payment Receipts.
7. Exhibit A7- True copy of the Photographs