



KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM

Complaint No. 34/2021

Dated 9th September 2021

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

Complainant

Alphonsa Residence Association
Rep: by its Secretary K.C James
Mulamootttil Homes,
Alphonsa Apartments
5th floor, No.E, College Road,
Kozhencherry P.O, Pathanamthitta

Respondents

1. Jacob Thomas
Mulamootttil House,
Kozhencherry P.O, Pathanamthitta
2. Molly Jacob
W/o. Jacob Thomas
Mulamootttil House,
Kozhencherry P.O, Pathanamthitta

The above Complaint has come up for hearing today on the issue of maintainability. The Complainant along with his Counsel Adv. P.V Joseph and Respondent's counsel Adv. Arun B Varghese attended the virtual hearing.

ORDER

1. The facts of the case are as follows: - The Complainant/ Association submits that there is delay in handing over of possession of the common areas and common facilities of the apartment complex to the Apartment Owners Association even after the registration of the Association on 12-05-2014. Even though car parking facility is offered in the documents of title of some of the apartment owners and car porch in some other title deeds, only eight car parking areas were earmarked and the Promoters usurped and unauthorisedly constructed other structures in the remaining parking lots and utilizing the same for their benefit by letting out the same to third parties. It is submitted that 16 apartments were contemplated in the original building permit and approved plan and 1/16 oodukar right in the 28 ½ cents of land had been given to the first 16 flat owners, the developer unauthorisedly constructed 22 apartments and fraudulently apportioned 1/20 the oodukar undivided and indivisible right in the 28 ½ cents of land is conveyed to the last purchased flat owners of the fourth floor whereas for making such conveyance deeds the promoter/ developer have remained no title in the property. Now the Respondents are trying to make further constructions above the fourth floor as if they have got right to make such unauthorised constructions in flagrant violation of the building rules. It is also submitted completion certificate/ occupancy certificate had not yet been obtained by the Promoters. The Respondents had enticed, lured and persuaded the flat owners to purchase the apartments proposed to be constructed by them with the common amenities described in their brochure namely 2 elevators including one bed lift with backup

generator, fire safety, car parking, air condition provision in the master bedroom in each flat, and roof top part area, fitness centre, drivers/servants toilet, garbage chute, basketball post, beautiful landscaping, children's play area, round the clock security provision, common lighting and water pump. Out of the said common facilities, barring the 8 car parking lots and the erecting of a low-quality lift and contributing $\frac{1}{2}$ of the expenditure for the other lift, all the other promises remained unfulfilled. No effective and efficient waste management system provided in the apartment complex. Inefficient and incomplete sewage mechanism was provided. Clearance certificate from the fire and safety department has not yet been obtained by the Promoter. The apartment owners have made prompt payments of all the instalments to the Promoters. The Complainants alleged that in spite of prompt payment of all instalments by the apartment owners, Respondents did not complete the Project within the specified time. The Respondents promised to complete the Project within 6 months of occupation and the flat owners were persuaded to occupy the apartment. Believing the assurance given by the Respondents as true, the flat owners occupied the apartments. It is also submitted that the Project is ongoing and is not registered in RERA. The reliefs sought by the Complainant is to direct the Respondents to handover the possession of the common areas and common facilities and amenities attached to Mulamootil Homes to the flat owners association namely, Alphonsa Residents Association within the time stipulated by the Authority and to complete the Project as envisaged in the covenants contained in the sale deeds executed in favour of the purchasers of the flats and for compensation for delay of completion of Project and handing over of possession of the common areas to the Association.

2. The Respondents have filed the Counter Affidavit in the above Complaint. At the outset it is submitted by the Respondents that the Complaint is not maintainable. The flats/apartments which are the subject matter of this Complaint have been completed and the tax was assessed in the financial year 2006-2007. (True copy of certificate bearing No. C4/1808/2021 dated 27/02/2021 is marked as Exhibit B1). It is also certified in the Exbt B1 certificate that the building is 14 years old. Only after completion of the building, the revenue inspector of the Panchayat will assess the tax and tax will be levied. (True copy of the building tax receipt dated 04/10/2006 issued by the Kozhencherry Grama Panchayat is marked as Exbt B2.) It is submitted by the Respondents that Exbt B2 also pertains to building bearing No. VIII/507 B which belongs to the person who claims to be the Secretary of the Complainant Association. Therefore, it is an admitted fact that the flat/apartments were constructed and completed before the enactment of Real Estate (Regulation and Development) Act 2016. By virtue of Section 1 (3) of the Real Estate (Regulation and Development) Act 2016, the Act will come into force on such date as the Central Government may publish the notification in the official Gazette which was on 26-03-2016. Since the building has been completed before the enactment of the Act 2016, no prior registration is required as contemplated under Section 3 of the Real Estate (Regulation and Development) Act 2016. Therefore, the Respondents submitted to consider the question of maintainability of the Complaint at first instance before proceeding further in this matter and to dismiss the Complaint as not maintainable.

3. It is also pointed out by the Respondents that the Complaint is filed suppressing material facts, and on that reason also the Complaint is liable to be dismissed. It is submitted that the

Complainant who is the Secretary of the Association is a member of the said association and not an owner in any of the Apartment/flats. He himself has settled the apartment in favour of her daughter and husband retaining his as well as his wife's life interest through a settlement deed registered as document No. 334/2016 of SRO, Kozhencherry (marked as Exbt B3). Therefore, the Secretary will not come under the definition of "Allottee" under Section 2 (d) of the Real Estate (Regulation and Development) Act 2016 and therefore the Complainant is not authorized to file this Complaint. It is submitted by the Respondents that they are trying to make further construction above the fourth floor is absolutely incorrect and the Respondents have no intention to make any such construction. The Respondents are also having an apartment in the same residential building complex. Initially the undivided shares over the land were sold to the parties and thereafter building was constructed and the same was handed over. The Complainants are using the flats since 2006-2007. All the amenities assured were provided to the Complainants. It is also submitted the Complainant is having personal animosity towards the Respondents and is filing frivolous Complaint at different forums. The flats are constructed in the property having 28 cents which is now only 26 cents as per the revenue records. There is another 5 cents of property adjacent to this property. The Respondents had constructed shop rooms in the said 5 cents of land. Alleging encroachments O.S No: 474/2019 was filed by the Complainant before the Munsiff Court, Pathanamthitta and the same is pending for consideration. When the Respondents constructed a truss work over the above said shop rooms, the Complainant filed WP(C) No: 35534/2019 before the Honourable High Court of Kerala and the same is also pending for consideration.

For the same allegations in this Complaint, a petition was filed before the Consumer Disputes Redressal Forum, Pathanamthitta as CC 81/2019 and the same is also pending for consideration. It is submitted that Complaints are filed at different forums for the same set of allegations and the Complainant cannot seek parallel remedies.

4. The Complainants have filed Rejoinder denying the contentions in the affidavit filed by the Respondents that the apartments were completed before the commencement of the Act and in support of that contention the Exhibits produced by the Respondents will in any way helpful to substantiate the Respondents contention. Exhibit B1 certificate is a certificate issued by the Secretary of Kozhencherry Grama Panchayat on 27-02-2021 where in it is stated that flat/apartment numbers 338 to 357 in the Alphonsa Apartments Complex in Ward No. XIII were mutated in the name of the respective flat owners in the year 2006-2007 and building tax were assessed and levied from them as per the building tax assessment register maintained in the said panchayat. But the Complainant submitted that it could not be any way be treated as a completion certificate of the Apartment complex within the meaning of term defined under section 2 (q) of the Act. The Respondents misconstrued the Occupancy certificate under section 2 (2f) and a completion certificate under section 2 (q) as one and the same and made a desperate attempt to establish that it is a completed Project even before the commencement of the Act. Whereas the common areas as defined under Section 2 (n)(i) to (viii) have not yet so far been completely constructed or handed over to the Flat Owners Association. The construction of the common areas covered by Section 2 (n) (i) to (iv) and (viii) are still remaining incomplete and

flat owners are forced to occupy the incomplete apartment complex in the midst of a total dearth of assured common facilities. Therefore, the Respondents contention that this is a completed Project is totally false and it is an on-going Project on the date of commencement of the Act and even now no completion certificate has so far been issued by the competent authority. Therefore, the Complainant submits that this is an on-going project which squarely comes under the mischief of Section 3 of the Act and is compulsorily registrable under the Act.

5. It is also submitted in Rejoinder filed by Complainant that Exhibit B2 is only a building tax receipt dated 04-10-2006 evidencing payment of building tax and Exhibit B3 is the certified copy of settlement deed no: 334/2016 executed by Complainant in favour of his daughter and son-in-law with life interest reserved to him and his wife. So, the Exhibit B3 will not in any way establish that the Complainant is the original Allottee it may at the best will go to show that Complainant being the original allottee has assigned his title in favour of his daughter and son-in-law through Exhibit B3 who will get absolute right only after Complainant's death. So, the Complainant is entitled to exercise all the rights and discharge all the duties of Allottees under Section 19 of the Act. The averment that Respondents are not making any further construction above the fourth floor and have no intention to make such construction is utter falsehood. It is submitted the construction above fourth floor without any approved plan or permit is still going on. The said unauthorised constructions were made in flagrant violation of Section 14 of the Real Estate (Regulation and Development) Act 2016 by deviating from the approved plan and permit. With the nefarious design to construct 4 more flats above the fourth floor without any plan or

permit and even by deviating from the approved plan and permit, the Respondent had delayed the handing over of the common areas including the terrace area to the Association even after several years of the formation of the Apartment owner's association by the Flat owners. The Complainants also pointed out that without any NOC or clearance certificate from the Fire and Rescue Services and even without any approved plan and permit the Respondents had constructed 4th and 5th floors which is now posing a grave safety threat to the inhabitants. The Respondents had encroached sizable portion of the landed property of the apartment complex and reduced it into their illegal possession by making the unauthorized construction of shop rooms there and thereby deprived the flat owners of their legitimate right over the car parking area set apart on the front portion of the apartment complex initially. The Complainants also alleged that OS No: 474/2019 filed before Munsiff Court, Pathanamthitta is for fixation of boundary of 28 ½ cents and for recovery of possession of the encroached land from the Respondents. The WP (C) 35534/2019 filed before Hon'ble High Court of Kerala is for seeking the issuance of a writ of mandamus or directions to the Panchayath Secretary for an early hearing and disposal of the application filed before Panchayat for the demolition of the unauthorised construction by the Respondents. The Complaint filed before the District Consumer Disputes Redressal Forum, Pathanamthitta as CC No: 81/2019 is against the unfair trade practice followed by the Respondents and for the removal of the deficiency in the services of the Respondents who are service providers as property developers. It is submitted that the relief sought for in any of the aforesaid petitions and the suit are in no way be parallel remedies. The Photographs produced by the Complainants (marked as Exhibit

A 2) will clearly show the incomplete construction made over the roof slab of the fourth floor after erecting truss work above it. The unauthorized ongoing construction of the fifth floor is clearly depicted in the photographs and the Respondents vague and evasive denial of the same is only an attempt to hoodwink the Authority and thereby trying to wriggle out of their responsibilities and liabilities as the Promoters.

6. Heard arguments from both parties in detail on maintainability issue and perused the documents submitted by them. The Respondents raised the issue of maintainability specifying that the flats/apartments which are the subject matter of this Complaint have been completed and the tax was assessed in the financial year 2006-2007, much before the date of commencement of the Real Estate (Regulation & Development) Act 2016 and moreover the Complainants have already approached various judicial forum seeking the remedies for their grievances shown in the Complaint filed herein. In the Complaint, the Complainants themselves stated that a complaint is pending before the Consumer Disputes Redressal Forum, Pathanamthitta. Thereafter, as per the direction of the Authority, copies of said complaint filed before Consumer Forum, plaint submitted in the Suit filed before the Munsiff Court, Pathanamthitta, and Writ Petition filed before the Hon'ble High Court of Kerala were produced before us. Here the reliefs sought by the Complainants are a) to direct the Respondents to handover the possession of the common areas and common facilities and amenities to the flat owner's association, b) to complete the Project as envisaged in the covenants contained in the sale deeds executed in favour of the purchasers of the flats and c) for compensation for delay

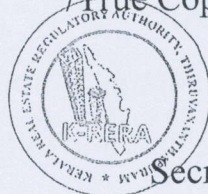
of completion of Project and handing over of possession of the common areas to the Association. It is seen that the Complainants have approached Consumer Forum, Pathanamthitta seeking similar reliefs for providing the facilities and amenities, car parking facilities and for compensation. The Complainants also filed a suit before the Munsiff Court, Pathanamthitta for declaring their title over the project land and to fix the boundary of it and also for an injunction restraining the Respondents from trespassing into their property and committing any mischief on it. It is also found that the Complainants approached the Hon'ble High Court of Kerala seeking direction against violation of Injunction order passed by the Munsiff court by the Respondents and also for a direction to the local authority to execute the stop memo issued to the Respondent. It is evident on perusal of all the above-mentioned documents placed before this Authority that the flats/apartments which are the subject matter of this Complaint have already been completed and the tax was assessed in the financial year 2006-2007, much before the date of commencement of the Real Estate (Regulation & Development) Act 2016 and the Complainants have already taken enough steps and approached other judicial forums for getting their grievances redressed. Hence the above complaint is not maintainable before this Authority.

The Complaint is dismissed. No order as to costs.

Sd/-
Smt. Preetha P Menon
Member

Sd/-
Sri. P H Kurian
Chairman

/True Copy/Forwarded By/Order



Secretary (legal)

APPENDIX

Exhibits on the side of the Complainants

- Exhibit A1 : True Copy of Registration Certificate and Bye-law
 Exhibit A2 : Photographs of building under dispute.
 Exhibit A3 Series: Copy of Sale Deeds
 Exhibit A4 : Copy of plaint in OS.No.474/2019 of Munsiff's
 Pathanamthitta.
 Exhibit A5 : Copy of Complaint in CC.No.81/2019 of Consumer
 Disputes Redressal Forum, Pathanamthitta.
 Exhibit A6 : Copy of memorandum of Writ Petition No.35534/2019.

Exhibits on the side of the Respondents

- Exhibit B1 : True Copy of certificate dated 27-02-2021 issued by the
 Secretary of the Kozhencherry Grama Panchayth
 Exhibit B2 : True Copy of building tax receipt dated 04-10-2006
 Exhibit B3 : True Copy of Settlement Deed No 334/2016
 of SRO Kozhencherry.