

**KERALA REAL ESTATE REGULATORY AUTHORITY****THIRUVANANTHAPURAM****Complaint No: 41/2022****Present: Smt. Preetha P Menon****Sri. M.P Mathews, Member****Dated 01<sup>st</sup> August 2022****Complainants**

1. Reby Thomas  
Thachenparambil Reby Villa,  
Mundencavu  
Chengannur  
Alapuzha- 689121
2. Anitha Reby  
Thachenparambil Reby Villa,  
Mundencavu  
Chengannur  
Alapuzha- 689121

**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,  
1<sup>st</sup> Floor, Cresnet Street, ABM Avenue, R A Puram,  
Chennai-600028



The Complaint came up for hearing on 27/05/2022. The Counsel for the Complainants Adv. Aysha Abraham and the Counsel for the Respondents Adv George Cherian appeared for the virtual hearing.

**ORDER**

1. The case of the Complainants in the above Complaint is as follows: The Complainants are the allottees of the project "Jain Tuffnell gardens" situated near Info Park, Kakkanad, Kochi which is developed by the Respondents. By seeing the advertisement given by the Respondents with offers of luxurious lifestyle apartments in the housing project having 8 blocks with 152 flats in each block in 8 acres of property with "State of the art living facilities" with impeccable design and stylish planning. After initial enquiries, the Complainant believed the Respondents mainly because major financial institutions had approved the project and were disbursing 90% of the cost of the apartment upfront under some unique scheme. The Respondent was also willing to help the Complainants with the dealings with State Bank of India who offered a 10/90 scheme under which the Complainants had to pay only 10% upfront and 90% would be dispersed by the bank. As per the said scheme, the builder would pay the EMIs for the first 36 months during which period the building was promised to be ready for possession and the builder would get the entire amount in one go rather than based on the completion of the project. In short, the builder was paying for the cost of capital which he was receiving even before the stages of completion of the building.



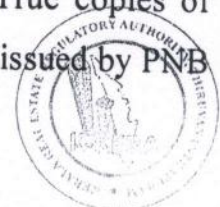
2. Accordingly, the Complainants paid an amount of Rs. 50,000/- on 13.06.2015 & Rs. 4,50,272/- on 29.07.2015 towards advance for apartment No. 4055 in the 5<sup>th</sup> Block. On 01.09.2015, the Complainants entered into an agreement for sale of property with the Respondent No. 2 as Power of Attorney holder for the original landowners. The Complainants paid an amount of Rs.5,02,448/- also on 05-10-2015. Thereafter, PNB Housing Finance Loan, has disbursed the amount of Rs. 40,00,000/- as per the request of Respondents. After collecting full payment, as per the direction of the 1<sup>st</sup> Respondent, the Complainants paid an amount of Rs.1,11,100 on 18-12-2015 towards registration cost of the flat and accordingly sale deed was executed on 18-12-2015. In the agreement for sale dated 01-09-2015, the Promoter undertakes to handover possession of the flat to the Allottees within one month after receipt of the entire amount due from the Allottees in terms of this agreement provided all necessary papers for acknowledging delivery of and Schedule C property are signed by the Allottees. However, the Project is still not completed though the builder, in violation of law and in collusion with the Municipal Authorities received an occupancy certificate on 07-10-2020.

3. The Complainants further submitted that when some of the buyers approached the Hon'ble High Court of Kerala with a writ petition where the builder produced certain documents pertaining to Environmental Clearance (EC) which clearly makes the entire construction illegal and Fire NOC clearly points out that the building will not be safe as it does not have some of the structural requirement for the Fire NOC. Another building of Jain Housing was demolished for violation of CRZ norms on the orders of the Hon'ble Supreme Court and the Complainants feel that similar fate awaits this building as well. Thereafter, the Complainants came to know about the pending litigation before the National Green Tribunal wherein the



EC granted to the Project was challenged by an NGO. From the report of the Joint committee formed as directed by NGT, it is established that the construction commenced without the mandatory 'Consent to Establish' from the Kerala State Pollution Control Board, the EC was applied for, after the commencement of the construction, and without disclosing the same, the EC was obtained. The builder declared that the Project is 1,39,885.78 while the 2016 regularization Permit showed an area of 1,92,637.80 sqm. On the Complaint made by one of the Homebuyers, the MoEF & CC inspected the construction site and found most conditions of the EC to have been violated and they never filed the mandatory reports and found the Builder to be a Habitual Offender. The building is constructed on paddy land where construction is prohibited under the Kerala Conservation of Paddy Land and Wetland Act, 2008.

4. The Complainants allege that the Respondents/builder had filed W. P (C) 9816 of 2021 in which it is stated that Tower No. 4 was being completed in the year 2015 and it was clearly admitted that the date of completion as declared with the Municipality is 23.03.2020. So, the Partial Occupancy as well as the 'Occupancy certificate' are illegal. When the Respondents induced the Complainants to part with their hard-earned money, the Respondents knew that the project did not even have a permit. The Complainants are unwilling to put their life at risk by entering a building that does not have the minimum required Fire Safety measures. Without disclosing the illegalities, the Respondents executed the sale deed in favor of the Complainants. The Complainants pray for a relief to get refunded an amount of Rs. 51,13,820/- along with interest @ 14.30% which is the prime lending rate of SBI plus 2% from the date of payment to the date of actual repayment and to allow the cost of the proceeding. The True copies of receipts, agreement for sale dated 01-09-2015, copy of letter issued by PNB



Housing Ltd, copy of sale deed dated 18-12-2015 and copy of report of joint committee dated 09-12-2009 are produced by the Complainants.

5. The Respondents submitted the written statement as follows: The Complaint is not maintainable and this Authority has no jurisdiction to entertain this complaint in view of Sec18 of the Act, 2016. The Authority can take cognize only when the promoter fails to complete or unable to give possession of an apartment or building in accordance with the terms of the agreement for sale and that the allottee wishes to withdraw from the project. In this case there is only a sale agreement and there is no construction agreement. The Respondent contended that the sale agreement and sale deed were executed which contains specific recitals that "*the Promoter having obtained required approvals from competent authorities, completed the construction in all respects and it is now ready for occupation. The Promoter has also obtained necessary completion certificate from chartered engineer/registered valuer*" and thus it is evident that the purchase of Flat No. 4055 was of 'as is where is' condition. So, the complaint for refund of purchase price is not maintainable. The first respondent has executed sale deed dated 18-12-2015 conveying apartment No. 4055 together with undivided share in the project land to the Complainant. The Complainants have filed a consumer complaint before the Consumer State Commission, Kerala in 2018 as CC No.57/2018 and on the basis of the Interim Order dated 18-02-2019 in I.A No. 150/2019 in CC 57/2018 the Complainants are enjoying all the amenities in the Jains Tuffnell Garden including free water, electricity, lift service, housekeeping and security. It was submitted that block No. 4 of Jains Tuffnell Garden was a completed apartment project as on 25-05-2013 as certified by the Chartered Engineer and the sale deed was registered in favour of the Complainants on 18.12.2015 which was handed over to the Complainants on the same day.

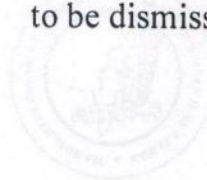


At the request of the Complainants sale deed of apartment No. 4055 together with undivided share was executed on 18-12-2015 and handed over to the Complainants. The Complainants and their family are still occupying apartment No. 4055 and enjoying all the amenities in the Project including free water, electricity, lift service, housekeeping, and security on the basis of the interim order of the Hon'ble Consumer State Commission, Thiruvananthapuram. The maintenance charges are in arrears from the Complainants.

6. The Respondents further submits that while the 1<sup>st</sup> 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 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 and the respondent obtained the partial occupancy certificate dated 26.07.2016. The allottees approached the Hon'ble High Court of Kerala through the very same counsel filing writ petition No. 26935/2019 regarding the sanctions impleading various Government Authorities. 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 counsel for the petitioners sought permission to withdraw the writ petition and accordingly the writ petition was dismissed as withdrawn. Further, the allottees through the very same counsel again approached the Hon'ble High Court of Kerala by filing Writ Petition no. 6581/2020 with similar prayers.



7. The Respondents submit 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. The Kerala Municipality Building Rules extended to Thrikkakara Grama Panchayat on 06/11/2006. It was also submitted that before the Municipality Building Rules came into force, builders started construction in the terms of the NOC plan. No prior permission is required for any construction in Panchayat areas. Since the construction was made in terms of the NOC, KMBR Rules 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 a number of cases filed by the allottees, Fire & Rescue Department has not acted upon the circulars issued by the State of Kerala in giving Fire NOC and Occupancy Certificate. Finally, due to the persistent follow-up and on the aforesaid circulars, the department of Fire & Rescue services issued certificate of approval on 06/08/2020 certifying that all rules and norms pertaining to Fire Safety Arrangement are satisfied in the project Jain Tuffnell Garden. Then the Thrikkakara Municipality also issued the Occupancy Certificate 07/10/2020 for the project. The partial occupancy certificate was received on 26.07.2016 and after getting fire NOC, the occupancy certificate dated 07.10.2020 was received. There is no liability on the Respondents to pay any interest to the Complainants since all the disputes have been amicably settled between the parties. The prayer for refund of Rs. 51,13,820/- along with interest at the rate of 14.30% is not tenable in the facts and circumstances of the case. The Complaint is bereft of any bonafides and an abuse of the process of the Authority which is liable to be dismissed with the compensatory cost of the Respondents. The copies



of order issued by Consumer Disputes Redressal, copy of electricity bill, copy of completion certificate, copy of partial occupancy certificate, copy of construction NOC, copy of certificate from Grama Panchayath, copy of circulars, copy of certificate issued by Fire and Rescue Department, copy of occupancy certificate, copy of scaling down of project informed all customers and copy of emails to customers, copy of judgment dated 23/01/2020 of Hon'ble High Court of Kerala and copy of case status verification of writ petition are produced from the part of the Respondents.

8. The above Complaint was heard by the division 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) Member- Smt. Preetha P Menon (2) Member- Sri. M P Mathews, in the following manner:

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

9. After hearing the learned counsels on either side, gave careful consideration to their submissions, perused the material documents available on record. After detailed hearing and perusal of pleadings and documents submitted by both the parties, following points came up for consideration:

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





2) Whether the Complainants herein are 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?

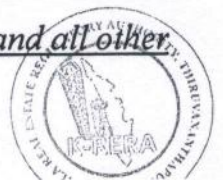
3) What order as to costs?

10. **Points No. 1&2:** 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.

11. The documents produced from the part of the Complainants are marked as Exhibit A1 to A7 and the documents produced from the part of the Respondents are marked as Exhibit B1 to B13. In the agreement for sale of flat dated 01-09-2015, produced by the Complainant and marked as Exhibit A3, it is mentioned that the allottee is desirous of purchasing one such residential unit in the said project and the Promoter has agreed to allot a flat/apartment described in Schedule C for a total consideration of Rs. 50,02,720/-. Rs.2,29,315/- towards cost of undivided share of land, described in Schedule B hereunder, Rs. 47,73,405/- towards cost of the flat. It is also mentioned further in last para of page 3 of the agreement for sale that "the Promoter having obtained required approvals from competent authorities, completed the construction in all respects and it is now ready for occupation. The Promoter has also obtained necessary completion certificate from chartered engineer/registered valuer" and Clause 6 of the said agreement states that "the Promoter hereby undertakes to handover possession of the flat to the allottee within one month after receipt of the entire amount due from the allottee in terms of this agreement provided all necessary papers for acknowledging delivery of and Schedule C property are signed by the allottee". The copy of the sale deed dated 18.12.2015 is also produced from the part of the Complainant and marked as Exhibit. A6 as per which "0.088% of undivided share right over the 343.72 Ares of land together with exclusive ownership, right, title and interest in the apartment No. 4055 and covered car park marked as No. 4055 together with all easements and right to use all common amenities and facilities and all other



rights therein obtained by the Vendors" has been transferred by the Respondents to the Complainants. Apart from that the copy of an interim order of the State Consumer Commission obtained by the Complainants herein is produced by the Respondent and marked as Exhibit B1, 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. 4055 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*". It is significant to note that the Complainants herein had executed Exhibit. A3 agreement for sale on 01.09.2015, in which it is clearly stated that the construction has been completed in all respects and possession of the flat shall be handed over to the allottee within one month after receipt of the entire amount due from the allottee and subsequently after 3 months, Exhibit. A6 Sale Deed was being executed in favour of the Complainant transferring the flat along with the undivided share of land and right to use the common amenities and facilities. It is also noted that there is no agreement for construction executed between parties and hence there is no question of 'failed promise' arises to invoke Section 18(1) of the Act. If at all there was a promise from the part of the Respondent and the Respondent failed to honour it, as stated above Section 18(1) of the Act clearly provides two options to the allottees i.e; (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. Here, the Complainants who are literate persons could have very well objected/denied execution of even Exhibit. A6 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.

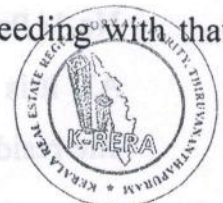


The Respondents' Counsel strongly argued that the Complainants were in possession of the apartment after handing over the original sale deed and were enjoying all the amenities provided in the project which is evident from the Exhibit B1 Order of the Consumer Commission. The Respondents produced copy of electricity bill in the name of the Complainants, which is marked as Exhibit. B2, to prove that the Complainants are in possession of the apartment. In the light of the said documents such as Exhibit. A3, Exhibit, A6, Exhibit. B1 and Exhibit. B2, there is no reason for us to believe that possession was not handed over to the Complainants. 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. On the basis of the above, it is to be concluded that the Complainants obtained ownership and possession of the apartment from Respondent/Promoter and they have been enjoying the amenities and facilities in the project. Hence the Complainants are not entitled to withdraw from the project at this stage and claim refund of the amount paid with interest as provided under Section 18 (1) of the Act 2016. Points No. 1&2 are answered against the Complainants.

12. 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. The copy of Occupancy Certificate obtained for the project is produced by the Respondents' counsel which is marked as Exhibit B9. 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 Exhibit. 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. As per the documents of registration with us, the Respondent/Promoter has registered only 2 blocks No. 4&5 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 Authority concerned 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.

13. 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.

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

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

- 1) Whether the promoter 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 a refund of the amount paid by them?

15. Document produced by the Complainant are marked as Exhibit A1 to A7 and the documents produced by the Respondents are marked as Exhibits B1 to B13. Agreement for Sale of flat dated 01-09-2015 executed between the Complainant/ Allottee and the Respondent No.1/ Promoter is produced by the Complainant and is marked as Exhibit A3. It is stated in the agreement that the allottee is desirous of purchasing one residential unit in the said project and the Promoter has agreed to allot



a flat/ apartment described in Schedule C for a total consideration of Rs.50,02,720/- Rs 2,29,315/- towards cost of undivided share of land described in Schedule and Rs.47,73,405/- towards cost of the flat. It is also mentioned that the Promoter having obtained required approvals from competent authorities, have completed the construction in all respects and its now ready for occupation. The Promoter has also obtained necessary completion certificate from Chartered Engineer/ Registered Valuer. The Promoter/ Respondent had also undertakes to handover possession of the flat to the Allottees within one month after receipt of the entire amount due from the allottees in terms of this agreement, provided all necessary papers for acknowledging delivery of and Schedule "C" property are signed by the Allottee.

16. The consideration set forth in the instrument dated 18.12.2015 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. 4055 having a super built-up area of 137.12 sq. mt in the Fourth Block on the 05<sup>th</sup> floor in the multistoried building named 'Jain Tuffnell Gardens" and covered car park marked as No. 4055 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/2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent represented by the 2<sup>nd</sup> Respondent. The entire sale consideration is stated to have been paid to the vendors who are the landowners and the 1<sup>st</sup> Respondent. The copy of the sale deed dated 17.03.2017 is produced and marked as Exhibit A6.

17. It is admitted by the Complainant that after collecting the full payment, as per the direction of the 1<sup>st</sup> Respondent, the Complainant paid the registration costs of the flat and got the sale deed executed by the



Respondent on 18.12.2015. The Respondents submitted that the Complainants had approached the Hon'ble State Consumer Disputes Redressal Commission and obtained an interim order to ensure that the common amenities including free water and electricity, lift facility, cleaning and security services enjoyed by the complainant are not cut off or denied by the respondent for the flat for flat No. 4055.

18. The Complainant had approached the Hon'ble State Consumer Disputes Redressal Commission through Complaint No. 57/2018 and obtained an interim order in IA No.150/2019, 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. 4055 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) (I) (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. Hence it is evident from the execution of the sale deed that the apartments were completed as per the terms of the agreement to the satisfaction of the Complainant and it is confirmed that the complainant had taken possession, after execution of the sale deed in his favour by the Promoter/landowner on 18.12.2015. Issue No.1 and 2 are decided accordingly.

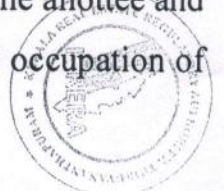
19. Occupancy Certificate received for the project was produced by the respondents and marked as Exhibit B9. This is not a case where there is no prospect of either constructing flats or delivering the property to the complainants, and the citations quoted by the respondent have no relevance as far as 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.

20. 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 B2. 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.*" 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 18/12/2015.



21. As per Sec. 19 (3) of the 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 (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.

22. 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. 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 agreement executed. It is therefore concluded that the apartments were completed as per the terms of the agreement for sale and possession was handed over.

23. 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 the occupation of building as provided under local laws, which has provisions 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 prescribed form. 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.

24. There was no compulsion on the complainant to take possession but the complainant is entitled to claim possession of the



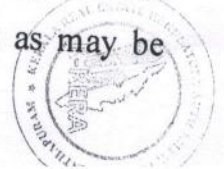
apartment under 19(3) of the Act, 2016. When possession was handed over under sec 19(3) of the Act after execution of the sale deed transferring the apartment to the complainant, and the complainant is enjoying ownership and possession of the apartment in the real estate project withdrawal from the project 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, after settling full payment and execution of sale deed in his favour.

25. As per Section 14(1) of the Act, 2016 "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.

26. 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”.

27. 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. It is understood from the sale deed that the apartment was transferred along with the undivided share over the common areas to the complainants on 18.12.2015. 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.

28. The Complainants had filed petition for refund under section 18 of the Real Estate Regulation and Development Act only after the sale deed was executed in their favour, after obtaining possession of the apartment, and after the occupancy certificate was issued by the local



body for the real estate project. For the aforementioned reasons, this Authority finds 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.

### **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 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 Complaint is hereby dismissed. Both parties shall bear their respective costs.

The Complainants, in case they have not received 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/-

Smt. Preetha P Menon  
Member

Sd/-

Sri M.P Mathews  
Member

/True Copy/Forwarded By/Order/

Secretary (Legal)



*Handwritten signature/initials*

## APPENDIX

### Exhibits on the side of the Complainants

- Exhibit A1 - True copy of the receipt dated 09-07-2015
- Exhibit A2 - True copy of receipt dated 29-07-2015
- Exhibit A3 - True copy of agreement for sale of Flat No. 4055 dated 1-09-2015.
- Exhibit A4 - True copy of receipt dated 03-10-2015
- Exhibit A5 - True copy of letter issued by PNB Housing Ltd dated 22.12.2015
- Exhibit A6 - True copy of Sale deed dated 18-12-2015
- Exhibit A7 - True copy of Report of Joint Committee dated 9.12.2009 appointed by NGT.

### Exhibits on the side of the Respondents

- Exhibit B1 - True copy of Order issued by Consumer Disputes Redressal.
- Exhibit B2 - True copy of the electricity bill.
- Exhibit B3 - True copy of the Completion Certificate dated No. 25.05.2013 issued by Chartered Engineer
- Exhibit B4 - True copy of the Partial Occupancy Certificate dated 26/07/2016.
- Exhibit B5 - True copy of the Construction NOC dated 31.08.2006
- Exhibit B6 - True copy of certificate No. A1-1/08 dated 09.09.2008 from Grama Panchayat.
- Exhibit B7 series- True copy of the Circulars dated 03.07.2007 & 22.06.2011



- Exhibit B8 - True copy of the certificate of approval dated 06.08.2020 issued by Fire & Rescue Department
- Exhibit B9 - True copy of occupancy certificate dated 07.10.2020.
- Exhibit B10 - True copy of scaling down of project informed all customers via e- mail dated 24.11.2008.
- Exhibit B11 - True copy of email to customers dated 21.11.2012.
- Exhibit B12 - True copy of Judgment dated 23/01/2020 of Hon'ble High Court of Kerala.
- Exhibit B13 - True copy of case status verification of writ petition taken from Website of Hon'ble High Court of Kerala.

Exhibits on the side of the Respondents

- Exhibit B1 - True copy of Order issued by Consumer Disputes Redressal.
- Exhibit B2 - True copy of the electricity bill.
- Exhibit B3 - True copy of the Completion Certificate dated No. 22.02.2013 issued by Chartered Engineer
- Exhibit B4 - True copy of the Partial Occupancy Certificate dated 26/07/2016.
- Exhibit B5 - True copy of the Construction NOC dated 31.08.2008
- Exhibit B6 - True copy of certificate No. A1-1A08 dated 09.09.2008 from Grama Panchayat.
- Exhibit B7 series - True copy of the Circulars dated 03.07.2007 & 22.06.2011