



**KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM**

Complaint No: 44/2022

**Present: Smt. Preetha P Menon
Sri. M.P Mathews, Member**

Dated 23rd day of June 2022

Complainants

1. Jacob Mathew,
Residing at 60 Lilly Valley Crescent,
King city, Ontario-L7B0B6.
2. M Mercy Jacob,
Residing at 60 Lilly Valley Crescent,
King city, Ontario-L7B0B6.
(Represented by Power of Attorney
Holder – Albert Robert Panakkal,
Plot No.101, Flat No.13,
Bharti Building, Oppo. Lions Community Hall road,
Ghatkopar, Mumbai, Maharashtra-400 077).

Respondents

1. Jain Housing & Construction Ltd
Having Registered office at
No. 98/99, Habibullah Road, T Nagar,
Chennai-600017.
(Represented by it's
Managing Director Sandeep Mehta).



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 Complaint came up for final 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 is as follows: The Complainants are allottees of the project named 'Tuffnell Gardens', Kakkanadu, Ernakulam who approached the Respondents, intending to purchase an apartment after seeing their advertisements in which the offer was "apartments in the said project having 8 blocks with 152 flats in each block on 8 acres of property with State-of-the-art living facilities" and the total project would be a township with impeccable design and stylish planning. The Respondent/Builder was willing to help the Complainants with the paperwork for loan from State Bank of India who offered a 10/90 scheme under which the Complainants had to pay only 10% upfront and 90% would be disbursed by the Bank and the 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.

2. Accordingly, the Complainants paid an amount of Rs.93,262/- as per cheque dated 20/02/2008, Rs.1,00,000/- as per cheque dated 20/02/2008 & also made another payment of Rs.1,90,000/- as per cheque dated 29/02/2008 towards 10% advance for apartment No.5075 in the 5th Block. On 01.03.2008, the Complainants entered into an agreement



for sale of property along with Memorandum of Agreement for construction of the apartments and the copy of memorandum of agreement is produced. As demanded by the builder, the Complainants made a further payment of Rs.3,171/- on 08/03/2008. Thereafter, State Bank of India, M. G. Road Branch, disbursed 90% amount of Rs.34,49,000/-. As per the construction agreement, the Respondents agreed to hand over the possession of the apartment within 36 months from the date of starting of the construction with a grace period of three months. Accordingly, the Respondents were legally bound to hand over the Apartment in December 2010. The Complainants have closed the Max- gain home loan and the copy of closing letter dated 14/12/2011 is produced. After collecting the full payment, the Respondents had not completed the 5th block as promised. The 5th block has not been granted the occupancy certificate even to this date by the Municipality. The Respondent builder has informed the Complainants that they are not intending to complete block 5. Thereafter, the Complainant came to know that the buildings are constructed in violation of various statutes including environmental norms. The Joint Committee appointed by NGT found that the buildings are built on paddy land where construction is prohibited under Kerala Conservation of Paddy Land and Wetland Act, 2008. The Construction was commenced without the mandatory 'Consent to Establish' from the Kerala State Pollution Control Board, and the same was occupied by the Builder without getting a consent to operate. The Environment Clearance was applied only after the commencement of the construction, which is illegal and therefore the EC was obtained by fraudulent means. The Copies of Memorandum of agreement, Payment receipts, sanction letter issued by the Bank, copy of letter showing closing of loan account, report of joint committee are produced from the part of Complainants.



3. The relief sought by the Complainants is refund of Rs.38,35,433/- 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 costs.

4. The Respondents submitted the written statement as follows: The Complaint is not maintainable as this Authority has no jurisdiction to entertain this complaint in view of Sec 18 of the Act, 2016. The Authority can take cognize only when the promoter fails to complete or is 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. The Complainant has suppressed the fact that the 1st Respondent has paid 36 EMI's in their loan account amounting to Rs.12,60,549/- to the State Bank of India. The Respondents further submitted that along with other Allottees the Complainant was also offered possession of their apartment No.5075 (4125). But the Complainants have not taken possession of their apartment or paid for the registration. The Block No.4 of the said project was a completed as on 25/05/2013. While the 1st Respondent 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 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 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 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.

5. 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. The Kerala Municipality Building Rules extended to Thrikkakara Grama Panchayet 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 Municipality also issued the Occupancy Certificate 07/10/2020 for the project. Hence the Complainants have no bonafides to approach this Authority and the complaint is liable to be dismissed with cost to the Respondents. Copies of Completion Certificate



dated No. 25.05.2013, Partial Occupancy Certificate dated 26/07/2016, Order dated 26935 of 2019 in Writ Petition No. 23/01/2020, copy of the certificate from Thrikkakkara Grama Panchayat dated 31/08/2006 & 09/09/2008, copy of the Fire NOC dated 06/08/2020 in the name of the Promoter, copy of the Occupancy Certificate dated 07/10/2020, copy of E-mail communications, Copy of certificate dated 28/04/2022 are produced from the side of Respondents.

6. We heard 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 were came up for consideration:

1) Whether 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 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?

7. **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.

8. The documents produced from the part of the Complainant are marked as Exbts.A1 to A5 and the documents produced from the part of the Respondents are marked as Exbt.B1 to B7. While going through the documents it is seen that there is a Memorandum of agreement dated 01/03/2008 executed between the Respondents and the Complainants which is marked as **Exhibit A1**. In the said agreement, the



complainant/allottee proposed to construct and the promoter had agreed to construct flat No.5075 on the 7th floor of block No.5. The lumpsum contract amount for the construction of the above said flats as per general specifications contained in schedule E referred to in the Memorandum of Agreement is Rs.36,03,305/-. The Respondents agreed as per the Memorandum of agreement/Construction agreement, to “hand over the possession of the apartments to the Complainant within 36 months from the date of starting of the construction with a grace period of 3 months”. In the Completion Certificate dated 25.05.2013, produced and marked as Exbt. B1, it is certified that “construction of the residential project “Jains Tuffnell Park Block 4” has been completed as per the approved plan and NOC No. A4-1/2000 dated 15.05.2013” which itself lacks clarity in the name of the project, date mentioned etc. The copy of Partial Occupancy Certificate dated 26.07.2016 produced by the Respondents cannot be acceptable because the Partial Occupancy certificate issued only for some floors of a high-rise building cannot be considered as the ‘Occupancy Certificate’ (mentioned as ‘Completion Certificate’ in the Act 2016) proclaiming completion of the real estate project as envisioned under the Real Estate (Regulation & Development) Act 2016 and the corresponding Rules 2018 which has been made clear many times by the Authority through earlier orders. But in the final Occupancy Certificate dated 07.10.2020 produced by the Respondent and marked as **Exbt.B5** the details of permit are shown as TP. 959/12 /Reg/2016/17 dated 15.06.2016 and the date of completion is written as 23.03.2020. **Exbt. B1** Completion Certificate of the Chartered Engineer show that the project/Block 4 was completed before 25.05.2013 itself. Surprisingly, the partial occupancy certificate issued for one or two floors of the building, shows that the date of completion is 30.06.2016 and the **Exbt.B5** final Occupancy Certificate dated 07.10.2020 states that the date of completion is 23.03.2020. The copy of Final Fire NOC produced by the



Respondents are marked as **Exbt.B4** is issued by the Fire department only on 06.08.2020. So, it is to be concluded that the project was completed as per the approved plans only by 07.10.2020, the date of issuance of final Occupancy Certificate. Hence, the contention raised by the Respondent/Promoter that “the project was completed in 2013 itself” is found to be false. If at all the said contention of the Respondents is considered, why didn't they intimate this fact to the Complainant who invested such a huge amount with them and hand over the key and execute the sale deed in his favour? The Exbt.B6 mail communication produced by the Respondents is a request to the Complainants to shift from Block 5 to Block 4 with offers to allot an apartment on higher floor and to waive off the amount of service tax which itself makes clear that they were at fault in honouring their promise to the Complainants. Moreover, the Respondents never objected the contention of the Complainants that “Block 5 has not been completed as promised”. Instead of denying it, the Respondents claim that they offered alternate flat in Block 4 to the Complainants. Though the Complainants paid the full amount of consideration, the Respondents did not execute the sale deed in favour of the complainants even after obtaining the Occupancy certificate on 07.10.2020.

9. According to Section 17 of the Act 2016, *“(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this*



section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to hand-over the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws: Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate."

But in this case, after obtaining the occupancy certificate on 07.10.2020, no attempt has been done by the Respondent till date to execute the Sale deed in favour of the Complainants and no documents have been placed on record by the Respondent to prove the contrary. So, the said acts of the Respondents amount to clear violation of the above-mentioned provision under Section 17 of the Act 2016. Here, there is no case for the Respondent that the Complainants defaulted in payments and no documents have been placed on record by the Respondent to prove that he had performed his part of the contract successfully.

10. According to Section 17 of the Act 2016, "(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.



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11. For the reasons stated above, it is evident that the possession of the flat has not been handed over to the Complainants as promised in the agreement and the sale deed has not been executed even after the receipt of occupancy certificate. 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. Hence it is clear that the Respondent has failed to hand over possession of the apartment. At the same time, the Respondent admits that Block 4 in which the apartment booked by the Complainants situated is not completed. On the basis of the aforementioned fact and findings, it is found that the Respondent/Promoter has failed to complete and hand over possession of the apartment to the Complainant/allottee as promised and therefore the Complainant/allottee is entitled to withdraw from the project and get



refunded the amount paid by him to the Respondent/Promoter along with interest as provided under section 18(1) of the Act,2016. Points No. 1&2 are answered accordingly in favour of the Complainant herein.

12. It is to be pointed out that the contentions and allegations raised by the Counsel for the Complainants with regard to the genuineness of the statutory sanctions and approvals obtained for the project have no significance in this case because the said issues of violations alleged by the complainants are to be considered by the concerned local body which is the competent authority to issue occupancy Certificate and then the LSGD Tribunal as well. According to 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 and the 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, 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. Section 14(1) of the Act 2016 stipulates that "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 confirmed that the section 14(1) stands complied with and it presupposes that all the required statutory approvals and sanctions such as Fire NOC, Environmental clearances, etc. have been obtained. Here, Copy of Fire NOC dated 06.08.2020 obtained for the project is also produced by the Respondent which is marked as Exbt. B4. In the reply arguments, the learned counsel for the Respondent/Promoter also pointed out 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. With respect to the payments made by the Complainants to the Respondents, the Complainant has produced Receipts of payments for Rs.3,86,433/- made to the Respondents which are marked as Exhibits A2 Series and copy of sanction letter issued by State Bank of India dated 14/03/2008 which is marked as Exbt.A3. Anyhow, the Respondents have not raised any objection on the said documents. The Complainant has also produced copy of letter showing the closing of loan account as on 07/12/2011 issued by the State Bank of India. Details of payments as confirmed by the Authority based on the above documents are as follows:

<u>Date</u>		<u>Amount</u>
20/02/2008	-	Rs.93,262/-
20/02/2008	-	Rs.1,00,000/-
29/02/2008	-	Rs.1,90,000/-
08/03/2008	-	Rs.3171/-
State Bank of India disbursed(loop amount)-		Rs.34,49,000/-
Total		Rs. 38,35,433/-

14. 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 according to section 18(1) of the Act, 2016. 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 Complainants claimed refund of Rs.38,35,433/- paid by him along with interest at the rate of 14.30% per annum from the date of each payment to the date of actual repayment. So, it is found that Respondents 1 and 2 are liable to pay Rs.38,35,433/- along with 14.30 % (12.30 current BPLR rate +2) simple interest from the date of each payment as scheduled above.

15. 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.38,35,433/-** to the Complainant along with interest @ **14.30%** simple interest per annum from the date of each payment as per the payment schedule above, 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/-
Smt. Preetha P Menon
Member

Sd/-
Sri. M.P. Mathews
Member

/True Copy/Forwarded By/Order

Secretary (legal)



EXHIBITS**Documents Produced from the part of the Complainants.**

- Exhibit A1 - True copy of Memorandum of agreement.
- Exhibit A2 Series - True copy of Payment receipts.
- Exhibit A3 - True copy of sanction letter issued by the Bank.
- Exhibit A4 - True copy of letter showing closing of loan account.
- Exhibit A5 - True copy of Order of National Green Tribunal.

Documents Produced from the part of the Respondents.

- Exhibit B1- True copy of the Completion Certificate dated No. 25.05.2013
- Exhibit B2- True copy of the Partial Occupancy Certificate dated
26/07/2016.
- Exhibit B3 Series -True copy of the Certificate from Thrikkakkara Grama
Panchayat dated 3108/2006 & 09/09/2008.
- Exhibit B4 - True copy of the Fire NOC dated 06/08/2020 in the name of
the Promoter.
- Exhibit B5 - True copy of the Occupancy Certificate dated 07/10/2020.
- Exhibit B6 - True copy of E-mail communications.
- Exhibit B7 - Copy of certificate dated 28/04/2022.

