



**KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM**

Complaint No. 62/2022

Present: Sri. M. P Mathews, Member

Dated 10th August, 2022

Complainants

Beckey Rajan
Thykoottathil House, Mangalam Kara,
Mangalam Village,
Vazharmangalam P O,
Chengannur Taluk, Alappuzha-689124

Respondents

1. M/s Malabar Developers(P) Ltd.,
41/2299, 3rd Floor, Malabar Gate,
Rama Mohan Road,
Kozhikode- 673004
(Present Address -Montana Estate,
Paingottupuram, Peringolam P.O,
Kozhicode-673571).
2. Jojo Joseph
Authorized Signatory
M/s Malabar Developers(P) Ltd.,
41/2299, 3rd Floor, Malabar Gate,
Rama Mohan Road,
Kozhikode- 673004
(Present Address - Montana Estate
Paingottupuram, Peringolam P.O, Kozhicode-673571).



3. Jose Chacko Arackal
Arackal House, Kaipuzha P O,
Kottayam
4. Annamma Jose
Arackal House, Kaipuzha P O,
Kottayam.

The above Complaint came up for virtual hearing on 23/06/2022. The Counsel for the Complainant Adv.V.Ajaykumar Counsel for the Respondents 1 & 2 Adv.Sameer Kharim and counsel for the Respondents 3& 4 Adv.Thomas P Makil attended the hearing.

ORDER

1. The facts of the case is as follows:- The Complainant is an allottee of project named 'Grand Maple Apartments' located at Muttambalam Village, Kottayam district developed by the Respondents. Based on the representations, promises, brochures and advertisements made by the Respondents the Complainant had entered into an agreement with the 1st Respondent on 25/10/2014 for purchase and construction of Apartment No.7E in the said project along with due undivided share of 1.48% of 28.75 Ares of property of Muttambalam Village and the total cost is fixed at Rs.97,85,742/-, out of which Rs.8,03,776/- is fixed as value of undivided share. It was further acknowledged in the agreement dated 25/10/2014 that out of the total consideration of Rs.97,85,742/-, Rs.1,00,000/- was paid towards advance land value and Rs.18,57,148/- was paid towards construction cost and thus in total the Complainant has made a payment of Rs.19,57,148/- by and before the execution of the said agreement and the balance amount agreed to be paid as per the schedule attached to the said agreement from 30/10/2014 to 30/0/2016 in



accordance with the work progress. The Complainant and her husband Mr.Rajan Daniel has availed a housing loan from State Bank of India SME, Kottayam Branch with a limit of Rs.56,00,000/- and the instalments due to the Respondents as per the schedule attached to the agreement was paid from the said loan account of the Complainant and her husband. A true copy of the letter from the State Bank of India, SME Branch along with the statements of accounts in the loan account No.67304123454 is produced. A total amount of Rs.36,73,824/- was released to the Respondents in instalments on various days. Though the Complainant has paid the instalments due promptly there was no progress in the construction of the apartment complex and the time stipulated for completion of the apartment project and handing over of the apartment No.7E to the Complainant ended on 24/02/2017. In spite of repeated reminders made by the Complainant regarding the delay in the progress of construction there is no satisfactory reply or explanation from the Respondents except promising the postponed dates of completion by the Respondents. As the Respondents failed to achieve progress of construction and failed to complete the construction and handing over of the apartment with all common amenities, in spite of payment of Rs.79,26,454/- which comes to 80% of the construction cost. Hence the Complainant is legally entitled to withdraw from the projects and to claim back the amount paid to the Respondents with interest and compensation.

2. The Complainant further submitted that the Complainant has opted to withdraw from the project and claim back the amount paid with interest and compensation. The Complainant has issued a lawyer's notice dated 01/01/2019 to the Respondents declaring her intention to withdraw from the project and claim back the amount paid with interest and compensation. The Respondents have issued a reply to the said notice raising untenable



contentions. On 01/02/2021 the Respondents have issued a mail to the Complainant that the Apartment No.7E got door number 49/1021/A-18. The Complainant has issued a letter to the Respondents on 25/03/2021 intimating why the Complainant cannot accept the new proposal. Hence the Complainant is entitled to recover an amount of Rs.79,26,454/- with interest at 14.05%.

3. The Relief sought by the Complainant is to direct the Respondents to pay an amount pf Rs.1,47,47,769.72/- towards return of amount paid with interest @ 14.05% along with future interest from the date of filing of this Complaint till realisation.

4. The Respondents 1& 2 have filed reply statement stating that the above Complaint is not maintainable either in law or on facts and there is no reasonable justification to file this Complaint and the same is only a cover up of his own laches and negligence to comply with the terms of the agreement. The Complainant was bound to make payments as per the payment schedule attached to the agreement and failing on the same is crucial and has a direct impact on completion of project and hence the allottee who has defaulted the terms of agreement has no right to allege delay on completion of project and hence his right to seek refund is governed by the terms of contract. The Complainant has only produced the construction agreement and has failed to produce the registered sale agreement, which is a material documents to consider the Complaint, without which the Complaint is liable to be dismissed.

5. The Respondents further submitted that in spite of condemnable delay on the part of the Complaint to pay the 19th and 20th instalments, this Respondents has not stopped the progress in work and as and



when the door numbers were obtained, an email was sent to the Complainant for doing the need full for registration of apartment as a part of goodwill gesture of the company. But surprisingly the Complainant refused to comply with the request and had opted out from the project for no good reasons and hence such withdrawal at the sole instance of the Complainant without any questionable default on the part of the Respondent, is subject to the terms and conditions as stipulated clause 11 & 12 of the agreement. It was further submitted that the Complainant is having no legal right to demand the interest rate stipulated in the statute and at the most what she is eligible is only to get the refund of the principal sum without interest. Though Rule 18 of Rules 2018 mentions word 'shall' regarding interest payable, the same is not mandatory nature and there is discretion on the part of the Authorities concerned to decide upon the interest payable and hence the demand for refunding the money with such huge rate of interest will work out utmost injustice to this Respondent. It was further submitted that there is no dispute on the figure paid to the Respondents for the construction of the apartment. But the Complainant is not entitled for the interest rate as mentioned in the Complaint as he is eligible to claim such huge interest from the Respondents, as she herself has defaulted payment of money as agreed between the parties and she is responsible for the delay in completion of the project. The project which ought to have been completed on February 2017, was completed on February 2019 and Occupancy certificate was obtained on 06/09/2019 and the project was ready to hand over. But after having defaulted payment of money, the Complainant herself opted to withdraw from the project and sought for refund, for which she is not entitled to do so in the manner she alleged in the Complaint and in her lawyer's notice. Copies of Occupancy Certificate dated 06/09/2019 and email dated 01/02/2021 are the documents produced from the part of the Respondents.



6. The Respondents 3 & 4 have filed Counter statement and submitted that the above Complaint is not maintainable and they are unnecessary parties to this dispute and are only included in the party array on technical grounds. The 1st Respondent had approached the 3rd and 4th Respondents with an offer to develop the said property by constructing the residential apartments and commercial spaces therein, to be sold to prospective external buyers and for selling or leasing out of commercial spaces and thereby entered into an agreement with the 1st Respondent on 07/05/2014 and handed over the vacant possession of the said property to the 1st Respondent for constructing a multi storied building named 'Grand Maple Apartments'. As per the said agreement the entire rights and responsibilities of constructing the said residential building complex by fixing the sale price of the sealable area and selling the apartments vests exclusively and entirely with the 1st Respondent alone. In fact the 1st Respondent had reserved for itself the exclusive right to construct market and sell the sealable area. Similarly the 3rd and 4th Respondents were also technically included in the said agreement. It is an admitted fact that the 1st Respondent alone who had negotiated with the Complainant and it was to the 1st Respondent alone she had paid the amounts. Even according to the Complainant no privity of contract had never existed or exists with the 3rd and 4th Respondent. Therefore even from the agreement, the entire responsibility to deliver the said apartment to the Complainant within the time frame assured, satisfying the agreed specifications rests solely upon the 1st Respondent. The Complainant is well aware that the 1st Respondent alone is responsible for the timely handing over of the subject apartment to the Complainant is the reason that the legal notice was issued by the Complainant only to the 1st Respondent and its authorised signatory. Hence the 3rd and 4th Respondents are unnecessary parties to this Complaint and no reliefs can be ordered against them.



7. When the case was posted on 26/04/2022, it was found that the real estate project is registerable under section 3 of the Act and direction was issued on the same day "to register the project named 'Grand Maple Apartments' within 15 days from the date of receipt of this order". In compliance of the same an application for registration of the project was submitted by the promoter / 1st Respondent on 24/05/2022 and the same is under scrutiny. The case was posted for final hearing on 23/06/2022.

8. The Authority heard the learned counsels on either side, gave careful consideration to their submissions, and perused the material documents available on record. The documents produced from the part of Complainant is marked as Exbt.A1 to A10 and the documents produced from the part of Respondent is marked as Exbt.B1 & B2. On going through the construction agreement dated 25/10/2014 which is marked as Exbt.A1, executed between the Complainant and the Respondents, the Respondents offered 1.48 undivided share in the land and also agreed to construct an apartment No.7E on the 7th floor having super built up area of 1920 sq.ft. including share of common area together with the right to enjoy all amenities and facilities in the common areas with one exclusive car parking apace for a total consideration of Rs.97,85,742/- It was also stated in the agreement that the execution of sale deed for transfer of title and delivery of possession of property shall be completed in all respects in 28 months from the date of this agreement.

9. Exbt.A2 is the copy of E-mail dated 25/06/2018, which is the mail forwarded by the Complainant to the Respondent expressing grave concern about the delay in completion of the Apartment No.7E of the project. Exbt.A3 is the reply given by the Respondent dated 06/11/2018 to the



mail referred above in which it is admitted that there is delay in the progress of work and the apartment will be completed by February 2019. Exbt.A4 is the mail forwarded by the Complainant seeking means to recover his investment in the project. Exbt.A5 is the lawyer's notice dated 01/01/2019 issued by the Counsel for the Complainant seeking refund of Rs.79,26,454/- paid for the said apartment along with interest @ 18% per annum from the date of agreement till realisation. Exbt.A6 is the reply notice issued by the counsel for Respondent to the Complainant along with 18% interest from the date of default within 10 days of receipt of the notice. The Respondent also intimated that they will be forced to cancel the agreement as per the terms and condition in the agreement and the amounts paid under the agreement shall be adjusted to the damages suffered. Exbt.A9 is the mail dated 01/02/2021 forwarded by the Respondents to the Complainant intimating that Apartment No.7E has received door number and procedure for registration initiated. Exbt.A10 is the letter dated 25/03/2021 issued by the Complainant to the Respondent in reply to the letter dated 18/03/2021 & 22/03/2021 of the Respondent. In the said letter the Complainant had expressed their dissatisfaction of delay in completion of the Apartment and also made it clear that he is not intended to execute the sale deed as per the mail dated 18/03/2021 & 23/02/2021. It is very clear that the Apartment was not completed within the stipulated time as per the terms of the agreement, ie., 28 months from the date of agreement which was 24/02/2017.

10. The Complainant had approached the Hon'ble Kerala State Consumer Disputes Redressal Commission, Thiruvananthapuram by filing CC.No.97/2019 on 30/07/2019 against the Respondents claiming return of the amount paid with interest and Compensation from the Respondents, but the same was withdrawn by the Complainant to file application before the Adjudicating Officer of the Real Estate Regulatory



Authority. The said application No.202/2021 was also withdrawn with liberty to file this Complaint due to subsequent delimitation of jurisdiction of the Adjudicating Officer and also with liberty to file application for compensation before the Adjudicating Officer.

11. The Respondents 1 & 2 have produced Exbt.B1 which is the partial Occupancy Certificate dated 06/09/2019 for having completed the residential apartments in the permit obtained for construction of the apartment & commercial area. As per clause 11(4)(f) the Promoter shall execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act; within 3 months from the date of issue of Occupancy Certificate. However Exbt.B2 is the copy of e-mail dated 01/02/2021 send after more than 15 months of obtaining the Occupancy Certificate, intimating the allottee to complete the payment before proceeding for registration. Therefore it is evident that the promoter had failed to perform his function and duty under Section 11(4)(f) of the Act. Even today the real estate project as per the permit is not fully completed and as per section 12 of the Act, 2016 also the Complainant is entitled to withdrawn from the project.

12. Section 18 of the Real Estate (Regulation & Development) Act 2016 stipulates that *“if the promoter fails to complete or is unable to give possession of an apartment, plot or building (a), accordance with the terms of the agreement for sale or duly completed by the date specified therein; or due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottee, 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 an 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". The Section 19(3) of the Act also specifies that "The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of subsection (2) of section 4. The Section 19(4) of the Act also specifies that "*The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, 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 agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder".* Here, in this case the Allottee is entitled to withdraw from the project and claim refund of the amount paid with interest.

13. While discussing the objects and reasons of the Act 2016 Supreme Court in Judgement dated 11/11/2021 M/s Newtech Promoters and Developers Pvt. Ltd Vs State of UP & Others had made a very important observation and the same is reproduced below "*The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that*



the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee. If the Promoter fails to give possession of the apartment plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way attributable to the allottee/homebuyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed". 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 per the terms of the agreement 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 the section 18 of the Act, 2016.

14. From the Exbt.A7 & A8 of documents which is the copy statement of account and letter from the state bank of India it is clear that the State Bank Of India had paid an amount of Rs.36,73,824/- to the Respondents on behalf of the Complainant as cost of apartment No.7E in the said project developed by the Respondents. The Respondents have also received an amount of Rs.19,57,148/- from the Complainant and the same was stated in the agreement dated 25/10/2014 itself. The Respondents have collected a total amount of Rs.79,26,454/- from the Complainants as cost of the said apartment. The details of payments made, as confirmed by the Authority are as detailed below:



<u>Date</u>		<u>Amount</u>
18/08/2014	-	Rs.1,00,000/-
25/10/2014	-	Rs.18,57,148/-
05/12/2014	-	Rs.3,91,430/-
25/08/2015	-	Rs.3,91,430/-
09/11/2015	-	Rs.3,91,430/-
29/01/2016	-	Rs.3,91,430 /-
29/01/2016	-	Rs.3,91,430 /-
20/05/2016	-	Rs.3,91,430 /-
20/05/2016	-	Rs.3,91,430 /-
20/05/2016	-	Rs.3,91,430 /-
17/06/2016	-	Rs.3,91,430 /-
20/07/2016	-	Rs.3,91,430 /-
19/08/2016	-	Rs.3,91,430 /-
01/10/2016	-	Rs.3,91,430 /-
26/10/2016	-	Rs.3,91,430 /-
08/12/2016	-	Rs.2,93,572 /-
31/01/2017	-	Rs.2,93,572 /-
31/01/2017	-	Rs.2,93,572 /-
Total	-	Rs. 79,26,454/-

15. The Respondents have not raised any objection on the said document and the total amount claimed by the Complainant. 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 present SBI PLR rate is 12.75% with effect from 15/06/2022. The Complainant is entitled to get 14.75% simple interest on the amount paid, from the date of payment as detailed above in the payment schedule till the date of refund as per Rule 18 of the Rules 2018. However the Complainant herein prayed for refund of the amount of Rs.79,26,454/- paid by him along with interest Hence it is found that the Respondent's 1 and 2 are liable to pay Rs.79,26,454/- Lakhs along with 14.75 % (12.75 (current BPLR rate) +2%) simple interest from the date of receipt of payment by the Respondents.

16. Based on the above facts and findings, invoking Section 37 of the Act, this Authority hereby passes the following order: -

1. The Respondents 1& 2 shall return the amount of Rs.79,26,454/- to the Complainant with simple interest @ 14.75% per annum on each payment from the date of actual payment, till the date of realization.


2. If the Respondents 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 No.1 and its assets & Respondents No.2 and his assets by executing this decree in accordance with the Real Estate (Regulation & Development) Act and Rules.



This order is issued without prejudice to the right of the Complainant to approach the Adjudicating officer with claims for compensation in accordance with the provisions of the Act and Rules, for any loss or damage sustained to them due to the default from the part of the Respondents.

Sd/-
Sri.M.P.Mathews
Member

[Handwritten mark]

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/True Copy/Forwarded By/Order

[Handwritten signature]
Secretary (legal)

Exhibits**Exhibits marked from the Side of Complainants**

- Ext.A1 - Copy of Construction agreement dated 25/10/2014
- Ext.A2 - Copy of E-Mail dated 25/06/2018.
- Ext.A3 - Copy of reply E-Mail dated 06/11/2018.
- Ext.A4 - Copy of E-mail dated 06/11/2018 send by Complainant to Respondents.
- Ext.A5 - Copy of notice dated 01/01/2019.
- Ext.A6 - Copy of reply notice dated 02/03/2019.
- Ext.A7 - Copy of letter from SBI dated 26/06/2019.
- Ext.A8 - Copy of statement of account.
- Ext.A9 - Copy of E-Mail dated 01/02/2021.
- Ext.A10 - Copy of letter dated 25/03/2021.

Exhibits marked from the Side of Respondents

- Ext.B1 - Copy of Partial Occupancy certificate dated 06/09/2019.
- Ext.B2 - Copy of E-Mail dated 01/02/2021.

