

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE V.G.ARUN

FRIDAY, THE 10TH DAY OF JUNE 2022 / 20TH JYAISHTA, 1944

WP(C) NO. 14890 OF 2022

PETITIONER/S:

ALFA VENTURES (P) LTD.,
ALFA TOWERS, I.S PRESS ROAD, ERNAKULAM, KOCHI -
682 018 REPRESENTED BY ITS DIRECTOR J. PAUL RAJ.
BY ADVS.
MATHEW B. KURIAN
K.T.THOMAS
NIKHIL BERNY

RESPONDENT/S:

- 1 STATE OF KERALA
REP. BY SECRETARY TO GOVERNMENT, LOCAL SELF
GOVERNMENT DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM - 695001.
- 2 KERALA REAL ESTATE REGULATORY AUTHORITY,
5TH FLOOR, SWARAJ BHAVAN, NANTHANCOD, KOWDIAR
P.O., THIRUVANANTHAPURAM - 695003, REP. BY ITS
CHAIRPERSON.
- 3 KADAVIL CHACKO CHERIAN,
8B, SKYLINE PLATINUM, RAJAJI ROAD, ERNAKULAM
COLLEGE P.O., KOCHI - 682035.
BY ADV C.M.NAZAR

OTHER PRESENT:

GP P.S.APPU; SC FOR R2 C.M.NAZAR

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 10.06.2022, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JUDGMENT

Dated this the 10th day of June, 2022

The petitioner is a private limited company engaged in the development and construction of major infrastructure and residential projects. One such project is 'Alfa Horizon', a multistoried commercial complex in Mulavukad Village in Ernakulam District. During the course of construction of the building, the petitioner entered into agreements with prospective buyers for sale of undivided shares in the land and also for construction of the building. Accordingly, the purchasers made substantial payments. Construction of the building was completed by early 2017 and completion certificate submitted on 10.05.2017. Occupancy certificate was issued by the Mulavukad Panchayat on 24.05.2018, more than an year of submission of the completion certificate. In the meanwhile, the Central

Government enacted the Real Estate [Regulation and Development] Act, 2016 ('the Act' for short). Various provisions of the Act were enforced from 01.05.2016 and 01.05.2017 onwards. Section 3 of the Act, providing for registration with the Real Estate Regulatory Authority was made applicable w.e.f. 01.05.2017. Section 84 of the Act makes it mandatory for the State Government to make rules for carrying out the provisions of the Act. Accordingly, the Kerala Real Estate [Regulation and Development] Rules, 2018 was introduced with effect from 14.06.2018 and the Kerala Real Estate Regulatory Authority [K-RERA] constituted on 05.10.2019. Thereafter, in exercise of the power under Section 20, the K-RERA issued public notice dated 26.12.2019, informing all promoters/ developers/ builders that, from 01.01.2020 onwards, they shall not advertise, market, book, sell or offer for sale or invite persons to purchase or transfer any plot, apartment or

building in a real estate project as defined in Section 2(zn) of the Act. This was followed by another notice dated 26.12.2019 calling upon the allottees/buyers to verify whether the project is registered with the K-RERA. Yet another public notice dated 22.02.2020 was issued by the second respondent, clarifying the meaning of the term 'on going project'. While so, the third respondent, a prospective purchaser of undivided shares in the Alfa Horizon project, filed a complaint before the second respondent [K-RERA] seeking refund of Rs.86,41,871/- paid to the petitioner towards sale consideration. Based on the complaint, the second respondent issued Ext.P10 notice, requiring the petitioner to appear for hearing on 31.03.2022. Accordingly, the petitioner appeared before the 2nd respondent and raised a contention that the Alfa Horizon project having been completed and occupancy certificate obtained prior to the introduction of

the Rules, the project/building does not require registration under the Act and is therefore not amenable to the jurisdiction of the K-RERA. A few days later, the petitioner received Ext.P11 notice dated 29.03.2022, requiring the petitioner to register the project, Alfa Horizon or to produce occupancy certificate to prove that the project is not fall under the purview of the Act. There is a further direction not to sell or market the unsold units till the project is registered. This writ petition is filed challenging Ext.P11 notice and for a declaration that the project 'Alfa Horizon' is not liable to be registered with the K-RERA.

2. Learned Counsel for the petitioner drew attention to the 1st proviso to Section 3 of the Act to contend that only on going projects are liable for registration, which position has been clarified by the Authority itself, vide Ext.P6 notification dated 27.12.2019. Therein, it is

stated that, real estate projects that have obtained occupancy certificate do not require registration under K-RERA and on going projects should be registered within three months from 01.01.2020. It is submitted that Section 3 of the Act was made applicable from 01.05.2017 and the K-RERA was constituted only on 01.01.2020, whereas the project Alfa Horizon was completed in the year 2017 and occupancy certificate obtained on 24.05.2018. As such, there cannot be any compulsion to register the project with the K-RERA. In support of the contention, reliance is placed on the decision of the Apex Court in **M/s.Newtech Promoters and Developers Pvt. Ltd v. State of UP and others [2021 SCC OnLine SC 1044]**

3. Learned Standing Counsel for K-RERA contended that the project Alfa Horizon squarely falls within the ambit of the term 'ongoing project'. It is submitted that Ext.P6 has no

relevance now, since that notification was subsequently withdrawn and replaced with another notification dated 19.04.2022, clarifying that, those real estate projects that had commenced before 01.05.2017 and not completed or occupancy certificate received as on 01.05.2017, shall be considered as 'ongoing projects' registerable under Section 3 of the Act. It is pointed out that the clarification was issued in the light of the decision in M/s. Newtech Promoters and Developers Pvt. Ltd, (*supra*), wherein the Apex Court has adumbrated on the retroactive character of the Act.

4. From the arguments advanced, the issue arising for consideration pertains to the scope and ambit of the term 'on going project' in Section 3 of the Act. In order to resolve the issue, it is necessary to have a close scrutiny of the relevant provisions. As per Section 2(q),

'completion certificate' means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority, certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws. The definition of the term 'competent authority' under Section 2(p) is as follows;

"(p) "competent authority" means the local authority or any authority created or established under any law for the time being in force by the appropriate Government which exercises authority over land under its jurisdiction, and has powers to give permission for development of such immovable property."

As per Section 2(zj), project means real estate project under Clause (zn). Following is the definition of Real Estate Project under 2(zn) is as under;

"(zn) "real estate project" means the development of a building or a building

consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto."

Section 3 deals with prior registration of real estate project with the Real Estate Regulatory Authority. Sub section (1) of Section 3 interdicts the promoters from advertising, marketing, booking, selling, offering for sale or inviting persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority. The 1st proviso to Section 3(1) being of importance is extracted hereunder for easy reference;

“Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act”

Going by the mandate of the proviso, projects that are on going on the date of commencement of the Act and for which the completion certificate has not been issued, are bound to apply for registration.

Section 3 of the Act was made applicable from 01.05.2017 onwards. Completion certificate for the project Alfa Horizon was issued only on 24.05.2018. Even if the contention that the construction of the project was completed prior to 01.05.2017 is accepted in its face value, that would not satisfy the twin requirement of the 1st proviso, of having completed the project and having submitted completion certificate prior to

the date of commencement of the Act. This position has been clarified by the 2nd respondent vide its notice dated 19.04.2022. In this regard, the legal position laid down by the Apex Court in **M/s.Newtech Promoters and Developers Pvt. Ltd.**, assumes relevance. The relevant portion of the judgment is extracted hereunder for easy reference;

"40. Learned counsel further submits that the key word, i.e., "ongoing on the date of the commencement of this Act" by necessary implication, exfacie and without any ambiguity, means and includes those projects which were ongoing and in cases where only issuance of completion certificate remained pending, legislature intended that even those projects have to be registered under the Act. Therefore, the ambit of Act is to bring all projects under its fold, provided that completion certificate has not been issued. The case of the appellant is based on "occupancy certificate" and not of "completion certificate". In this context, learned counsel submits that the said proviso ought to be read with *Section 3(2)(b)*, which

specifically excludes projects where completion certificate has been received prior to the commencement of the Act. Thus, those projects under Section 3(2) need not be registered under the Act and, therefore, the intent of the Act hinges on whether or not a project has received a completion certificate on the date of commencement of the Act.

41. The clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an ongoing project. Thus, it negates the contention of the promoters regarding the contractual terms having an overriding effect over the

retrospective applicability of the Act, even on facts of this case."

The 'completion certificate' under the Act is distinct from the completion certificate contemplated under Rule 22 of the Kerala Municipality Building Rules. Under Rule 22 of the KMBR, the owner can, on completion of the building, submit a completion certificate certified and signed by him, to the Secretary of the Municipality in the form in Appendix E. On the other hand, the 1st proviso to Section 3 of the Act contemplates issuance of completion certificate by the competent authority, viz, the Secretary of the Local Self Government Institution. Indisputably, the completion certificate of Alfa Horizon was not issued in the manner provided under Section 3, prior to the introduction of that provision. As such, it can unhesitatingly be held that Alfa Horizon was an ongoing project as on the date of introduction of

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Section 3 of the Act (01.05.2017), the concomitant position being that the project is liable to be registered with the K-RERA.

For the aforementioned reasons, the writ petition is dismissed.

Sd/-

V.G.ARUN
JUDGE

Scl/10.06.2022

APPENDIX OF WP(C) 14890/2022

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE BUILDING PERMIT DATED 16.05.2008 ISSUED BY THE MULAVUKADU GRAMA PANCHAYAT.
- Exhibit P2 TRUE COPY OF THE ORDER DATED 08.08.2008 ISSUED BY THE MULAVUKADU GRAMA PANCHAYAT.
- Exhibit P3 TRUE COPY OF THE COMPLETION CERTIFICATE DATED 10.05.2017 SUBMITTED BY THE PETITIONER.
- Exhibit P4 TRUE COPY OF THE OCCUPANCY CERTIFICATE DATED 24.05.2018 ISSUED BY MULAVUKAD PANCHAYAT.
- Exhibit P5 TRUE COPY OF THE PUBLIC NOTICE DATED 26.12.2019 ISSUED BY 2ND RESPONDENT.
- Exhibit P6 TRUE COPY OF THE PUBLIC NOTICE DATED 27.12.2019 ISSUED BY 2ND RESPONDENT.
- Exhibit P7 TRUE COPY OF THE PUBLIC NOTICE DATED 22.02.2020 ISSUED BY 2ND RESPONDENT.
- Exhibit P8 TRUE COPY OF THE DECISION IN NEWTECH PROMOTERS & DEVELOPERS P LTD. VS. STATE OF U.P - 2021 (8) SUPREME 15.
- Exhibit P9 TRUE COPY OF THE COMPLAINT NO.69/2022 FILED BY 3RD RESPONDENT BEFORE K-RERA.
- Exhibit P10 TRUE COPY OF THE NOTICE DATED 31.03.2022 ISSUED BY 2ND RESPONDENT .
- Exhibit P11 TRUE COPY OF THE NOTICE DATED 29.03.2022 ISSUED BY 2ND RESPONDENT.
- Exhibit P12 TRUE COPY OF THE ORDER 11.08.2021 IN MISC. APPL. NO.1808-1809/2019 IN C.A NO.4784-4793/2019 PASSED BY THE SUPREME COURT OF INDIA.

