



**KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM**

Dated 27th January, 2021

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

COMMON ORDER

IN

**COMPLAINTS NOs: 121/2020, 122/2020, 123/2020, 124/2020, 153/2020,
155/2020, 156/2020, 210/2020 & 216/2020**

1. COMPLAINT NO. 121/2020

Complainant

L. Rajendran, Flat No. 1 B,
Atrech Empire, Pattoor Junction,
Vanchiyoore P O,
Trivandrum 695035.

[By Advocate Pazhania Pillai]

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
3. M/S Jay Ventures (P) Ltd., represented
by Aparna Nair, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
4. Aparna Nair, Director, M/S Jay Ventures (P) Ltd.,
T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
5. Corporation of Thiruvananthapuram,

Represented by Secretary, Corporation of Thiruvananthapuram.

6. Secretary, Corporation of Thiruvananthapuram,

[Respondents 1 to 4 by Advocate V. Ajakumar]

2. COMPLAINT NO. 122/2020

Complainant

Constance Nirmala Newton, Flat No. 5H,
Atrech Empire, Pattoor Junction,
Vanchiyoore P O,
Trivandrum 695035

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.

[By Advocate V. Ajakumar]

3. COMPLAINT NO. 123/2020

Complainant

Sasikanth Namboothiri & Dr. Anjali,
Flat No. 15B, Atrech Empire, Pattoor Junction,
Vanchiyoore P O,
Trivandrum 695035

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.

[By Advocate V. Ajakumar]

4. COMPLAINT NO. 124/2020

Complainant

Thara Eradi, Flat No. 14J,
Atrech Empire, Pattoor Junction,
Vanchiyoore P O,
Trivandrum 695035

[By Advocate Pirappancode V.S Sudheer]

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.

5. COMPLAINT NO. 153/2020

Complainant

Mr Johnson B T, Flat No. 10A,
Atrech Empire, Pattoor Junction,
Vanchiyoore P O,
Trivandrum 695035

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
3. M/S Jay Ventures (P) Ltd., represented
by Aparna Nair, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.

4. Aparna Nair, Director, M/S Jay Ventures (P) Ltd.,
T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
5. Corporation of Thiruvananthapuram,
Represented by Secretary, Corporation of Thiruvananthapuram.
6. Secretary, Corporation of Thiruvananthapuram,

[Respondents 1 to 4 by Advocate V. Ajakumar]

6. COMPLAINT NO. 155/2020

Complainant

Bijeesh Basheer, Flat No. 10D,
Atrech Empire, Pattoor Junction,
Vanchiyoore P O,
Trivandrum 695035

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
3. M/S Jay Ventures (P) Ltd., represented
by Aparna Nair, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
4. Aparna Nair, Director, M/S Jay Ventures (P) Ltd.,
T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
5. Corporation of Thiruvananthapuram,
Represented by Secretary, Corporation of Thiruvananthapuram.
6. Secretary, Corporation of Thiruvananthapuram,

[Respondents 1 to 4 by Advocate V. Ajakumar]

7. COMPLAINT NO. 156/2020

Complainant

Dr. Rajeevan & Dr. Soja, Flat No. 5F,
Atrech Empire, Pattoor Junction,
Vanchiyoor P O,
Trivandrum 695035.

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.

[By Advocate V. Ajakumar]

8. COMPLAINT NO. 210/2020

Complainant

Varghese Thomas
XX/C-67, Flat 1A,
Avenue Manor Apartments, Mukkolakkal,
Thiruvananthapuram- 695 043

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.

[By Advocate V. Ajakumar]

9. COMPLAINT NO. 216/2020

Complainant

Elizabeth Sabena George
Flat No.3A, Artech Empire Pattoor Junction,
Vanchiyoor P.O, Thiruvananthapuram- 695 035

Respondent(s):

1. M/S Artech Realtors Pvt. Ltd. represented
by T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.
2. T S Asok, T C No. 24/2014(1), Artech House,
Thycadu P O, Thiruvananthapuram 695014.

[By Advocate V. Ajakumar]

COMMON ORDER

1. As the above 9 complaints are related to the same project developed by the same Promoter, the cause of action and the reliefs sought in all the complaints are one and the same, the said Complaints are clubbed and taken up together for joint hearing for passing a common order, as provided under Regulation 6(6) of Kerala Real Estate Regulatory Authority (General) Regulations, 2020.

2. The Complainant in Complaint No. 121/2020 is one of the land owners of the Project land who entered into a 'Joint venture development agreement' on 11.01.2011 with the Respondent No.1 represented by Respondent No. 2 for constructing residential as well as commercial complexes in the property and as consideration, as provided in the JV agreement, he was allotted with apartments; 1B on the 1st floor, 2B on the 2nd floor, 4B on the 4th floor, 5J on the 5th floor and 7J on the 7th floor. He submits that one more flat offered has not been allotted yet in the residential building complex named 'Artech Empire' consisting of B+G+ 14 floors allegedly constructed in 158.50 cents in Schedule A(Item No. 1) with total area of 20,000 sq.ft. This includes

7,000 sq ft commercial complex. The copy of 'Joint Venture Development Agreement' is produced by the Complainant in Complaint No. 121/2020.

3. All the other Complainants are allottees/purchasers of flats in the residential complex 'Artech Empire' who executed sale and construction agreement with the 1st Respondent, promoter. The common allegations of all the Complainants including the Complainant in complaint No. 121/2020 are as follows: The Respondent made the Complainants believe that the Residential complex is slated to be developed 97.75 cents out of 192.233 cents land situated at Vanchiyoov village. In the agreements it was also stated that apart from the said residential complex, the Respondent is going to construct the commercial complex named 'Artech World' consisting of B+G+4 floors on 80 cents lying on the north side of Schedule A(Item No.2), a Commercial building named 'Naveena Arcade' consisting of G+1st floor on 12 cents of land lying on the south eastern side of Schedule A(Item No. 3) and existing building named 'Artech Anupama' consisting of G+ 3 floors on 14.3 cents lying on the north eastern side of Schedule A (Item No. 4) . In this construction, the maximum FAR prescribed by the Government and permitted by the Corporation for the building is 4 and accordingly, as far as the Artech Empire, the residential building, can use 2,76,051 sq ft. Hence it is mandatory as per the Kerala Municipality Building Rules that 158.65 cents of land is required for constructing the said residential complex having 2,76,051 sq.ft and not 97.750 cents wherein the Respondent can only construct 1,70,085 sq.ft. The complainant as well as other allottees of the project were totally ignorant of the fraud played on them that the Respondent had encroached the undivided shares of their land of 60.90 cents and constructed the other building Artech World. The Corporation of Thiruvananthapuram has permitted to carry out such an unauthorized construction and it was by practicing fraud, deception and collusion that the Respondent had constructed the mall following naked

violation of building rules. The Complainant as well each other allottees are entitled to get 1.25 cents in 158.65 cents instead of 0.77 cents in 97.750 cents. Apart from that the Respondent had also encroached upon the setback provided for the residential complex as contemplated in the plan for constructing the mall and two other commercial buildings. The Respondent had not even spared the space allotted for the passage of fire engine to the residential complex and so the residents are now deprived of the fire protection and in the event of any mishaps, the lives of residents including senior citizens and children are at stake. Thus the provisions laid down for providing fire escape systems in the building rules are violated blatantly.

4. It is further alleged that the residential building had been provided with 2 emergency entrance and exit, as per the Building rules which is reflected in the plan also but in reality there is only one entrance and exit now having only a width of 8.75 meters. The other entrance & exit has been taken away and now used for parking two wheelers of persons using the Mall. As per the Building Rules, it is mandatory to have a rain water harvesting provision but the same is also conspicuously absent. As per the Rule, the Respondent is bound to provide workable ground water recharging arrangement at an integral part of the building through connection of roof top rain water. He has not provided the storage tank and such other components. Despite severe water shortage, the Respondent did not provide the provision for rain water harvesting which shows his discrimination. The pipes used for reticulated LPG gas supply are not as per specification and is done with MS pipe instead of GI pipe defined for the purpose and so the pipes have been rusted. Though it was brought to his notice, he has not done anything to change the pipes and so the lives of residents are in danger. The tiles provided in the drive way are of substandard quality and as no interlocking blocks are provided, the drive way is heavily damaged and the senior citizens residing there are at the risk of falling down and suffering

serious injuries due to such disintegrated tiles on the walkways. It is also alleged that the case iron covers of manhole openings of the drainage and sewerage are of substandard quality and within the short period, most of them have cracked. Some of them are on the pathway/drive way which is a serious danger to the lives of residents and their children. No provision for telephone connection in the lift and in case of emergency, the users are left high and dry. The video door phones installed that is supposed to have access from entrance gate is not functioning and is installed for just fancy. There are no multilevel security systems for common areas. The Respondent has not yet handed over to the complainants any documents pertaining to the project. The Complainants are unable to effect mutation of their property in the revenue records as the Respondent did not hand over the documents concerned. The Complainants believe that the Respondent had pledged the title documents of the project and availed huge loans from some financial institutions. Though the Respondent had provided water to the Mall and other commercial buildings, he did not take any steps to provide water connection to the Complainants.

5. The relief sought by the Complainants are to direct the Respondent i) to demolish the Mall referred to again as the commercial complex called Artech World, constructed in 60.90 cents of property which are the undivided interest/share of each of the purchaser of the flats in Artech Empire, ii) to restore and further maintain the setback of 9 meters in the front, 8 meters in the rear, 7 m. and 7.2 on the eastern and western sides of Artech Empire, even at the expense demolishing the commercial complex, iii) to restore the two engine passages, provided on the north west and again in the north side in the space between the Mall and the residential complex Artech Empire building, iv) to restore the 2 entrance and exit, already provided in the approved plan and further which was in existence, v) to provide water connection to Artech Empire, vi) to provide encumbrance certificate for transfer of registry, enabling

the complainants to effect mutation of their property, vii) to install safe and good quality GI gas pipe line by removing the present substandard MS gas pipe line, viii) to open and give full control and free access to the exit gate to the north eastern side with exit to palayam-airport road, ix) to replace the tiles of driveway/outdoor pathway with good quality interlocking concrete blocks, x) to replace all substandard cast iron covers installed over manholes of drains and sewerages now posing danger to the lives of residents of Artech Empire and xi) to provide security system, install cctv and phone in the lift, as well as gas leak sensors to all the flats.

6. The Respondent No. 1 filed preliminary objections and counter statements in all the 9 complaints. In the counter statement filed by the Respondent No. 1 in Complaint No. 121/2020, it is contended that the Complaint is not maintainable either in law or on facts because the said Complainant is a land lord of a portion of the project land and he entered into a Joint venture agreement on 11.01.2011 with the 1st Respondent which provides provision for Arbitration in case of any dispute between parties. It is also stated that the Complainant in this complaint comes under the definition of 'Promoter' under the Real Estate (Regulation & Development) Act 2016 (for short "the Act") and he is not entitled to file a complaint against the co-promoter. The Respondents 2,3,4,5 & 6 are not promoters, allottees or real estate agents as far as the complainant is concerned and the complainant cannot file any complaint against them under section 31 of the Act. The Complaint does not explain which of the provision of the Act, Rules or Regulations are violated and how it was violated. The Complaint is with respect to alleged violation of Rules of KMBR for which the Complainant ought to have raised complaint before the appropriate forums created for the adjudication of such disputes. The Completion certificate in respect of the project was obtained on much before the commencement of the Act. The project is not registerable before this

Authority and a complaint in respect of those projects could be entertained by this Authority only in a limited circumstances stipulated in the Act and no such circumstances were ever pleaded in this complaint. The order passed by the Corporation issuing Occupancy Certificate accepting the Completion certificate has become final and any challenge against the same is barred by limitation. The Reliefs claimed in the complaint are not pertaining to the provisions of the Act especially when admittedly possession was taken by the Complainant in full satisfaction of completion of construction with all common facilities and common amenities. On the basis of above contentions through the preliminary objections, the 1st Respondent requested this Authority to consider the maintainability as preliminary issue.

7. In the Counter Statement filed in complaint No. 121/2020, the 1st Respondent further alleged that he is entitled to recover more than Rs. 2,35,74,162/- with interest from the complainant in complaint No. 121/2020 and the 1st Respondent initiated Arbitration proceedings against the Complainant which is pending before the Hon'ble High Court of Kerala as A. R. No. 56/2020. The disputes under joint venture agreement are commercial disputes as per the provisions of Section 2(1) (c)(xi) of Commercial Courts Act 2015 and exclusively coming under the jurisdiction of the Commercial Courts or Commercial Arbitration Tribunal.

8. The 1st Respondent alleges in the counter statements filed in all other complaints that the said complaints are filed in active collusion with one of the landlords who gave his property for the joint development. These complaints are not maintainable in this Authority. These complaints do not explain which of the provisions of the Act, Rules or Regulations are violated and how they were violated. The agreements entered into between these complainants and the 1st Respondent stipulate for arbitration in the event of any dispute arose out of the agreement. He submits that he has fulfilled all

obligations under the agreement with the allottees and the same were accepted by them, took possession and got the sale deeds executed and the claims herein are not covered under the agreements executed with them by the 1st Respondent. Few of the allottees who are cronies of the Complainant in complaint No. 121/2020 approached the 1st Respondent Builder for unreasonable concessions, started fight with him which was denied by all other legal forums, launched these new complaints. All the allottees have taken possession of the apartments and comfortably enjoying their apartments. No circumstances were ever alleged or pleaded in the complaints to attract Sections 11 (4) or 14(3) of the Act. This Authority is not empowered to adjudicate the complaints against the acts done by the statutory /local authorities and separate statutory authorities are available to the aggrieved persons for the alleged violations.

9. The 1st Respondent further contend that there is no violation in the issue of permit and issue of Occupancy in the project. Various vexatious complaints were filed against this project before various authorities including Vigilance, Lokayukta and Hon'ble High Court of Kerala but all these authorities found there is no fault on the part of the Respondent No. 1&2. The Construction was done strictly in conformity with the permit. When the Corporation refused to issue Occupancy out of fear of litigations, the 1st Respondent approached Hon'ble High Court of Kerala who directed the Corporation to issue Occupancy unconditionally. But the Corporation has issued Occupancy certificate noting the case numbers to safeguard their heads. The open spaces and set backs were provided as shown in the permit plan and the construction was done as per the permit and approved plan. The Statutory authorities have verified the requirements, the plan and permit and the occupancy was issued after due verification. The Complainant in 121/2020, one of the landlords has obtained an injunction against the formation of the Association. The rain water harvesting is provided in the project. The reticulated gas pipes are of good quality and there is no need for any fear for

the inmates in this regard. The interlock pavers are laid in drive ways and walk ways with good quality tiles but due to rough use and unauthorized use of heavy vehicles some tiles were broken which have to be replaced by the apartment owners. There was no cracks in the manhole covers. There was no promise given to provide telephone in the lift. The video door phones are of good quality and functioning well. The apartments were transferred without any encumbrances. The project loan availed by the 1st Respondent by submitting the J V agreement never remains as a charge over the project property. The 1st Respondent has never trespassed over 60 cents and the Mall was constructed as per the approved plan. This Authority has no jurisdiction to look into the alleged permit violation and pass order for the demolition of Mall. Fire passages and fire escape systems are provided as per rules and the same is subject to periodical inspection by the Fire and Safety department. No generator was installed at the fire passage. The Respondents never interfered with the emergency exit and entrance to Artech Empire. The water connection could be applied only on getting Occupancy. The application for water connection was rejected illegally by Water Authority stating that 1st Respondent has filed cases against the Water Authority against which the writ petition was filed by the Respondent in which the Hon'ble High Court ordered to give water connection to the apartments within 3 weeks. But till date the order for water connection is not issued by KWA. It is stated in the sale agreements that for the delay on the part of statutory authorities, the promoter shall not be liable. Certain flats provided to the land owner were not registered in his favour as huge amount is due from him under various heads. The Respondent never mortgaged or encumbered any of the apartments belong to the customers. The title deeds and other documents can be handed over only to the Association and the land lord Mr. L Rajendran has obtained an injunction order against formation of association from the Munsiff court, Thiruvananthapuram. The adverse remarks were made by the Comptroller and Auditor General based on some false and

interested reports by the then Vigilance Director and the same is found to be baseless on verification of reports by competent authorities later. The 1st Respondent further pleads that out of the 124 apartment owners only few have ventured for filing vexatious complaints in order to harass the Respondents 1 & 2 and other innocent customers and so the complaint be dismissed with compensatory costs to the Respondents. The 1st Respondent produced the following documents in Complaint No. 121/2020.

- (1) Copy order in IA No. 13061/2019 of O.S 1692/2019.
- (2) Copy of order in Complaint No.92/2020
- (3) Notice dated 26.02.2020.

The above documents were marked as **Exhibit B1 to B3**

10. The Complainant in complaint No. 121/2020 filed rejoinder/reply to the objections of the 1st Respondent stating that in the joint venture agreement it is clearly stated that it cannot be treated as a partnership between land owner and developer. He is an allottee and not a co-promoter as alleged by the 1st Respondent and he can approach this forum for getting his grievances redressed. The Real Estate (Regulation & Development) Act 2016 supercedes and has an overriding effect over the provisions of the Arbitration Act and this is an additional/special remedy provided under the statute. The RERA is a welfare legislation with social and public policy, objectives of protecting the right of the allottees. The Respondent has filed the Arbitration case only on 13.08.2020 as a counter blast with ulterior motive, nearly 5 months after filing this complaint before this Authority.

11. We have 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 Complaint No. 121/2020 & other complaints are maintainable before this Authority and whether this Authority has jurisdiction to adjudicate the issues raised by the Complainants?
- 2) Whether the Respondents have violated any of the provisions of the Real Estate (Regulation & Development) Act 2016 and whether the Complainants are entitled to get any relief under the provisions of this Act?
- 3) What order as to costs?

12. Point No. 1: As far as Complaint No. 121/2020 is concerned, the main argument raised by the Respondent No.1 & 2 is that as the Complainant is one of the land owners of the project land, he comes under the definition of 'Promoter' under the Act and hence he is not entitled to file a complaint against the co-promoter, the 1st Respondent with whom a Joint venture agreement is entered into by the said Complainant which provides for arbitration in case of any dispute between parties. It is also argued by the Respondent No. 1 & 2 that the disputes under joint venture agreements are commercial disputes as per the provisions of Commercial Courts Act 2015 and exclusively comes under the jurisdiction of Commercial Court or Commercial Arbitration Tribunal. For coming into conclusion in the abovementioned issues, the terms and conditions of the Joint Venture agreement (or by whatever name it calls) between the Promoter/Developer and the Land Owner are to be taken into core consideration. As per the terms of the 'Joint Venture Development Agreement' between the said Complainant and the 1st Respondent, the Complainant shall execute and register an irrevocable Power of Attorney in favour of the 1st Respondent to enable him to proceed with obtaining licenses and plans, consents for construction, to represent the Complainant/land owner before all statutory authorities and also for execution of sale deeds of the undivided shares

in the property and building therein. It is also specified in this agreement that 'this agreement will not be treated as a partnership between the owner and developer'. Other terms of the said agreement also show that the Land Owner gives full right and authority to the Developer to commence, carry on and complete the development in the property, to engage labour of his choice, give sub contract and so on and "the Land Owner shall in no way be responsible or liable for finalization of the project or its modification". Hence it is clear that the Complainant/Land owner herein had no role in the development, construction, marketing or sales of the project. Moreover he had given an irrevocable power of attorney to the Respondent/promoter which is duly registered before the sub-registrar concerned through which he gave all the powers to the Respondent/Promoter including that for executing sale deeds in favour of allottees of the project. It is also submitted by the Complainant/landowner that no sale deeds have been executed so far in respect of apartments allotted to him as consideration by the Respondent/Promoter. Hence it is clear that the Complainant/Land owner could not sell these apartments till date to any other third parties. For all these reasons, the Complainant in complaint No. 121/2020 cannot be treated as a Co-promoter.

13. Next question to be decided in this context of maintainability is whether the Complainant in complaint No. 121/2020 can be treated as an 'allottee' while adjudicating the grievances in his complaint as well as in the other complaints in common? It is to be noted that though the Complainant in Complaint No. 121/2020 is a land owner the grievances as well as the reliefs sought by him are same as that in other complaints filed by the allottees. To be specific, the said Complainant neither disputes any violation of terms of the Joint venture agreement nor prays for any special reliefs such as quantity of consideration or any delay in completion or delivery of apartments allotted to him as consideration. The decision of Hon'ble Supreme Court of India in

Bunga Daniel Babu vs M/s Sri Vasudeva Constructions & others, we are inclined to think, requires appropriate appreciation in this regard. In this case, the Apex Court while deciding whether the Land owner of the project can be considered as a 'Consumer' under the Consumer protection Act, ruled that "*as the appellant is neither a partner nor a co-adventurer, he has no say or control over the construction, he does not participate in the business and he is only entitled to a certain constructed area. The extent of area does not make a difference. Therefore, the irresistible conclusion is that the appellant is a consumer under the Act.*" In this regard, the Apex Court observed further as follows :

"we are concerned with a third hybrid category which is popularly called as "joint-venture agreements" or "development agreements" or "collaboration agreements" between a landholder and a builder. In such transactions, the landholder provides the land. The builder puts up a building. Thereafter, the landowner and builder share the constructed area. The builder delivers the "owner's share" to the landholder and retains the "builder's share". The landholder sells/transfers undivided share(s) in the land corresponding to the builder's share of the building to the builder or his nominees. As a result each apartment owner becomes the owner of the apartment with corresponding undivided share in the land and an undivided share in the common areas of the building. In such a contract, the owner's share may be a single apartment or several apartments. The landholder who gets some apartments may retain the same or may dispose of his share of apartments with corresponding undivided shares to others. The usual feature of these agreements is that the landholder will have no say or control in the construction. Nor will he have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. His only right is to demand delivery of his share of constructed area in accordance with the

specifications. In a true joint venture agreement between the landowner and another (whether a recognised builder or fund provider), the landowner is a true partner or co-adventurer in the venture where the landowner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture”.

14. It is relatable to this complaint No. 121/2020 where the Complainant/land owner has no role or control in the construction, management or sale of the project and he has no share in the profit/loss in the said business as well as per the terms of the joint venture agreement. Here in this complaint, as mentioned above, the Complainant sought the same reliefs as that of other allottees regarding violation of building rules, non-completion of certain amenities, non-providing of water & electricity, poor workmanship and quality of materials used in some common areas of the project. To check whether this complainant/landowner can be treated as an “allottee” to that extent, some more observations of Apex court in the aforementioned judgement are to be referred again. It continues as follows:

“It has also been stated therein that while the builder commits breach of his obligations, the owner has two options; he has the right to enforce specific performance and/or claim damages by approaching civil court or can approach consumer forum under the Act. In the course of delineation, the Court proceeded to state:- “But the important aspect is the avilment of services of the builder by the landowner for a house construction (construction of the owner’s share of the building) for a consideration. To that extent, the landowner is a consumer, the builder is a service provider and if there is deficiency in service in regard to construction, the dispute raised by the landowner will be a consumer dispute.”

15. The Act defines the term ‘allottee’ as “the person to whom a plot, apartment or building has been allotted, sold(whether freehold or leasehold) or

otherwise transferred by the promoter and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person on whom such plot, apartment or building is given on rent". Here the Complainant has been allotted with certain number of apartments which is evident from the allotment letters given by the 1st Respondent. On the basis of the whole factual matrix and in view of the aforesaid judgement of the Apex Court, we find that the complainant can be treated as an allottee to the extent of the grievances raised and reliefs sought in this particular complaint. The case said to be directed by the Civil Court for arbitration is purely with respect to violation of terms of Joint venture agreement between the Complainant and the 1st Respondent which need not be linked with this complaint. The Complainant in complaint No. 121/2020 has produced the copies of 1) Joint Venture Agreement dated 11.01.2011 which is marked as **Exbt. A1**, 2) Letters of allotment of flats dated 23.08.2013 & 17.03.2017 which are marked as **Exbt. A2 & Exbt. A3**.

16. Regarding the grievances of the complainants in all the complaints, the main allegation is with respect to the violation of the building rules by the 1st Respondent/ Promoter that the 1st Respondent had trespassed into more than 60 cents of the undivided interest of land belongs to the allottees of Artech Empire and encroached the setbacks provided to the said residential building Artech Empire and constructed the commercial complex/mall therein. As per the provisions of the Act, this Authority has no jurisdiction to entertain complaints regarding violation of building rules. If the Complainants have any dispute regarding violation of building rules, they can approach the local authority against the Promoter and the LSGD Tribunal against the default or inaction, if any, from the part of the local authority. At the same time, if there is any violation from the part of the Promoter in adhering the sanctioned plan and specifications while developing and completing the project, or any addition

or alteration done in the sanctioned plans and specifications without consent of the allottees, it amounts to violation of Sec.14 of the Act and in such cases, the Allottees can approach this Authority with complaints as per the Sec.71 of the Act. But in this case, the Complainants themselves produced copy of the Occupancy Certificate (even if it is provisional/conditional), which certifies that “the construction of the building under the revised permit E6/BA/0098/11 dated 17.06.2014 is in accordance with the rectified revised completion plan”. The copy of Occupancy certificate dated 21.04.2018 is marked as Exhibit A4.

17. The contentions of 1st Respondent that ‘the project is not a registerable project as the same was completed and handed over before the commencement of the Act and a complaint in respect of such a project could be entertained by the Authority only in the limited circumstances stipulated under the Act’ etc, are not legally sustainable as Section 31 of the Act which gives right to any aggrieved person to “file a complaint before the Authority or the Adjudicating Officer for any violation or contravention of the provisions of the Act or the Rules and Regulations made thereunder against any Promoter, allottee or real estate agent” came into force on 01.05.2016 itself, the right got vested with them since that date. If a real estate project was not completed as on 01.05.2016, as per the promises made by the Promoter, the aggrieved party can approach this Authority with his grievances related to that project. In this connection, it is significant to note that the completion of a ‘Real Estate Project’ is not merely the completion of building/s or execution of sale deeds or receipt of Development Certificate/Occupancy Certificate from the local authority but completion of the whole project with all the common amenities and facilities as committed to the allottee as per the terms and conditions of the agreements executed between the Promoter and Allottee. It is also to be noted in this context that the Promoter shall have the responsibility to enable formation of Association of allottees, to transfer common areas to the Association and also

to hand over all the documents pertaining to the project to the Association before exiting from the project. Complainants in complaint No. 124/2020, 155/2020 and 210/2020 produced copies of the sale & construction agreements executed by the 1st Respondent with them which are marked as **Exbt. A5 to A7**. For all the reasons aforementioned and as far as grievances other than that of violation of building rules, these complaints are maintainable before this Authority and this Authority has power to adjudicate those issues. The Point No.1 is answered accordingly.

18. As far as the issuance of Occupancy certificate is concerned, we express our serious concern over the practice of local authority, issuing such a provisional or conditional occupancy certificate declaring that “issued subject to the final judgement of all the present cases pending before various courts”. In this context, our grave apprehension is whether the ultimate purpose of such a provision for issuing Occupancy Certificate to a building and especially a high rise building will be served or not? As per the Act, ‘Occupancy certificate’ is defined as “the Occupancy Certificate or such other certificate, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity”. In the Copy of Occupancy Certificate issued by Thiruvananthapuram Corporation for the project Artech Empire, it is certified that “the building is now fit for residential occupation” after which it is inserted as ‘N.B.’ that “it is issued only as per the judgement of Hon’ble High Court and it is subject to the final judgement of all the present cases before Hon’ble High Court and Hon’ble Lokayukta”. How could they presume the final judgement to be pronounced by a judicial forum be not detrimental to the allottees/occupants of the project/building? It is to be noted that apart from Partial Occupancy, there are no such provisions, either in Kerala Municipality Building Rules or in Kerala Panchayath Building Rules for issuance of any

provisional or conditional Occupancy Certificates. Is it the headache of innocent home buyers, who trusted the builder and invested their hard earned money for their dream home, to seek out the veracity of such an Occupancy Certificate and its fate? It is also observed that plenty of cases and counter cases have been filed in connection with title of the project land, issuance of Occupancy certificate & building number, issuance of water connection, etc. and some of them are still pending consideration of various judicial forums/authorities. As directed by this Authority, the learned counsel for Respondents No. 1&2 submitted copies of orders passed by Hon'ble Lokayuktha and Hon'ble High Court of Kerala. The dispute regarding the allegation of encroachment of Government land is one of the main issue and the obstacle behind some of the present issues pending in the project. It is specifically noted that instead of resolving it, the Respondent No. 2 himself challenged the interim order passed by the Hon'ble Lokayuktha and managed to get a stay order and the said case is also still pending before the Hon'ble High Court. It is the duty and responsibility of the Respondent Promoters to expedite said cases and processes connected therewith and resolve all the issues so as to give allottees, a peaceful and comfortable community living in the project. An allottee of a real estate project invests his/her hard earned money, not only for the single unit/apartment/villa but for the whole amenities and facilities offered to him/her in the project and also for enjoying a peaceful community living there. As misconceived by many of the Promoters, the completion of a real estate project is not merely handing over the apartments or execution of sale deeds or somehow obtaining occupancy certificates, but completion of the total project in all respects with all the sanctions and approvals as promised to the allottees and ultimately handing over all the documents concerned to the Association of allottees.

19. The learned counsels appeared for the Complainants submitted that they came to know from some sources that the project land has been mortgaged and huge amount of loan has been availed by the 1st Respondent. But the learned Counsel for the 1st Respondent defended it submitting that the loan availed will not affect the interest of any of the complainants. But he could not convince the Authority the same by producing any evidence to support his contention. It is also noticed that the Association of allottees has not been formed so far in the said Project. It is represented by the 1st Respondent that they could not form an association because the Complainant in complaint No. 121/2020 obtained an injunction from the civil court restraining them from forming the Association. How could a single allottee obtain such an injunction order that would adversely affect the interest of all other allottees of the project? As it is one of the main obligations cast upon the Promoter as per the Act, why the 1st Respondent not defended it before the said Civil Court pointing out such a mandatory provision under the Act and the consequences of its violation? During arguments, the learned counsels for the Complainants drew our attention also to some other violations of obligations/promises by the 1st Respondent such as non-procurement of water & electricity connections to the project, non-handing over of documents pertaining to the project, usage of substandard quality of materials in piping system, interlock pavers & man hole covers, non-providing of rain harvesting, telephones in the lifts and video door phones etc. It is to be noted that an Association is necessary for proper maintenance of the project properties. The Promoter could have formed an Association much earlier and handed over the maintenance of common areas to the Association. In the absence of an Association, it is the duty of the Promoter to repair/rectify all the defects pointed out by the Complainants.

20. The learned counsel appeared for the 1st & 2nd Respondents vehemently argued that the complaints did not explain which of the provisions

of the Act, Rules or Regulations are violated and how it was violated. Be it noted, in this context, some of the responsibilities of the Promoters, as laid down under the Act, are as follows : the Promoter, at the time of the booking and issue of allotment letter, shall be responsible to make available to the allottee, the sanctioned plans, layout plans, along with specifications, approved by the competent authority and the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity. The Promoter shall also be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period shall continue even after the conveyance deed of all the apartments, plots or buildings, to the allottees are executed.

21. We find it is worthy to note that as per Section 11(4) of the Act, the Promoter shall also be mandatorily responsible for **1)** providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees; **2)** enable the formation of an association of the allottees, within a period of three months of the majority of allottees having booked their plot or apartment or building, in the project; **3)** execute a registered conveyance deed in favour of the allottee and the undivided proportionate title in the common areas to the association of allottees, **4)** pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for

water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project): Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person; 5) after he executes an agreement for sale, not mortgage or create a charge on such apartment, and if any, such mortgage or charge is made or created then, notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment. As stipulated under Section 31 of the Act, “any aggrieved person may file a complaint with the Authority for any violation or contravention of the provisions of the Act or rules and regulations made thereunder against any Promoter”. Having considered all the above mentioned facts and circumstances, we are of the view that the 1st & 2nd Respondents have failed to hand over the project to the Complainants as promised to them and thereby violated the provisions of the Act. Hence the Complainants are entitled to get the following reliefs and Point No.2 is answered accordingly.

22. In view of the above facts and circumstances, this Authority invoking Section 34(f) & 37 of the Act hereby gives final directions to the 1st & 2nd Respondents/ Promoters, as follows:

- 1) 1st & 2nd Respondents shall ensure that the constructions in the project ‘Artech Empire’ have been done in accordance with the sanctioned

permit and plan and as per the promises/commitments given to the allottees;

- 2) 1st & 2nd Respondents shall make all earnest efforts to expedite all the pending cases related to the Project including that related to the title of the project land and issuance of water connection to the project and ensure that all the allottees have obtained permanent electricity and water connections;
- 3) 1st & 2nd Respondents shall enable formation of Association of allottees as per the provision under Section 11(4)(e) of the Act and its registration after which hand over all the documents related to the project including all the permits & sanctions, title deeds of the project land with latest encumbrance certificate and revenue updates. These Respondents shall make sure that the project land is free of any mortgage or charge.
- 4) 1st & 2nd Respondents shall complete all the pending sale deed registrations in favour of allottees and that of Complainant in Complaint No. 121/2020 after settling the dispute pending before the Arbitration Court.
- 5) Apart from the above, the 1st & 2nd Respondents shall a) restore the fire engine passages Artech Empire building as per the sanctioned plan, b) restore the two entrances and exits provided in the approved plan, c) Ensure safety and quality of gas pipe line as per the specifications prescribed by the gas supplying company, d) replace the broken tiles of driveway/outdoor pathway with good quality interlocking concrete blocks and ensure safety of the residents, e) replace or repair damaged cast iron covers installed over manholes of drains and sewerages now posing danger to the lives of residents of Artech Empire and f) provide security system, install cctv and phone in the lift as per the terms of the agreement for sale.

- 6) The Respondent/Promoter shall submit the compliance report in the form of a sworn affidavit **within 2 months** from the date of receipt of this order.

Both parties shall bear their respective costs.

This order is issued without prejudice to the right of the Complainants to approach the Authority in accordance with the provisions of the Act and Rules, for compensation for the damage/loss, if any, sustained to them, due to any default from the part of the Respondents No.1 & 2.

Sd /-

Smt. Preetha P Menon
Member

Sd/-

Sri. P H Kurian
Chairman

True Copy/Forwarded By/Order/




Secretary (Legal)

APPENDIX

Exhibits on the side of the Complainants

- | | | |
|---------------------|---|----------------------------|
| Exhibit A1 : | Joint Venture Development Agreement dated 11.01.2011 | } Complaint
No 121/2020 |
| Exhibit A2 : | Letter of allotment dated 11.01.2011 | |
| Exhibit A3 : | Letter of Allotment dated 17.03.2017 | |
| Exhibit A4 : | Occupancy Certificate issued by Trivandrum city Corporation dated 21.4.2018 | |
| Exhibit A5 : | Copy of Agreement for sale & construction dated 3.9.2013- | } Complaint No.124/2020 |
| Exhibit A6 : | Copy of Agreement for sale and construction dated 30.5.2012 | |
| Exhibit A7 : | Copy of Agreement for sale and construction dated 13.1.2012- | } Complaint No. 210/2020 |

Exhibits on the side of the Respondents

- Exhibit B1 :** Copy of the order in IA 13061/2019 in OS 1692/2019
- Exhibit B2 :** Copy of the order dated 25.06.2020 in Complaint No. 92/2020
- Exhibit B3 :** Copy of notice dated 26.02.2020