



KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint No.129/2022

Dated 29th November, 2022

Present: Sri.M.P.Mathews, Member

Complainant

Philip K Itty,
Kunnuthara Malayil,
Keezhvaipur P.O,
Pathanamthitta -689587.

(By Adv.P.E Lalachan)

Respondents

1. Elixir Corporates,
Elixir Gardens,
Near St.Behnan's Higher Secondary School,
Vennikkulam-689 544,
Mallapally, Pathanamthitta.
2. Jacob Mathew,
Managing Partner,
Elixir Corporates,
C7-2076/13, Elixir Gardens,
Near St.Behnan's Higher Secondary School,
Vennikkulam-689 544, Mallapally, Pathanamthitta.

(By Adv.Basil Mathew)



The above Complaint was finally heard on 21/10/2022. Counsel for the Complainant and Respondent attended the hearing virtually.

ORDER

1. The Complainant is an allottee of project named 'Elixir Grande' located at Thiruvalla, developed by the Respondents. The said project is registered with the Authority under section 3 of the Act, (Registration No.K-RERA/PRJ/191/2021).

2. The Complainant had booked an apartment in the said project and executed agreement for sale and construction agreement on 27/06/2016. The Complainants paid Rs.31,64,618/- in instalments from 2014 to July 2018 as per agreed terms. The Complainant had paid booking amount of Rs.1,00,000/- on 24/03/2014, first instalment of Rs.8,46,000/- on 25/04/2014, second instalment of Rs.295,000/- on 25/04/2014, third instalment of Rs.53,000/- on 12/05/2014, fourth instalment of Rs.46,238/- on 22/06/2016, fifth instalment of Rs.50,000/- on 22/06/2016, sixth instalment of Rs.5,56,095/- on 25/08/2017, seventh instalment of Rs.1,06,095/- on 22/03/2018, eighth instalment of Rs.5,56,095/- on 12/07/2018 and ninth instalment of Rs.5,56,095/- on 12/07/2018.

3. The Complainant further submitted that as per the agreement the Respondents were obliged to complete the construction of the project by December 2018 and to handover possession of the apartment to the Complainant by June 2019. The Complainant had stopped payment of further instalments to the 1st Respondent as the Respondents committed serious breach of the contract and continues to remain evasive on the question of completion of the project. Nearly 40 % of the work is still to be executed. The delay in completing and handing over the apartment has caused immense,



financial loss and irreparable inconvenience to the Complainant and the Complainant is not able to afford further losses on account of the delay. Hence the Complainant wishes to withdraw from the project in accordance with section 18 of the Act, 2016 as the Respondents failed to complete the project as per the agreed time schedule and handover possession of the apartment to the Complainant. Copies of construction agreement dated 27/06/2016, payment receipts, copies of email communications and building permit are the documents produced from the part of the Complainant.

4. The Respondents have filed objection stating that the above Complaint is not maintainable and denied all the allegations contained in the Complaint. The Respondents submitted that the Complainant ought to have terminated the said agreement even prior to the filing of the above case. As the agreement for construction was not terminated prior to the filing of the above case, the above Complaint and the reliefs sought are not maintainable. It was also states that the Complainant is a chronic defaulter in paying the instalments, during the contract periods. He has defaulted to pay the instalments in time and such defaults have badly affected the pace of construction. If the Complainant didn't want to continue with the booking, he would have cancelled the booking earlier and allowed builder to resell the apartment.

5. The Respondents further stated that usually the 1st Respondent will accept only 10% of the total amount due, as booking charges. But the Complainant offered to pay Rs.12,94,000/- to the Respondents and demanded to reduce the rate considering the aforesaid additional amount offered as advance by the Complainant. Considering the offer of an additional payment of Rs.7,07,905/- by the Complainant immediately after the booking, the Respondent has agreed to reduce the rate of the apartment and offered to sell the undivided share in the land,



construction of the apartment and to allot a carparking for a total amount of Rs.58,60,950/- plus GST. The offer was accepted by the Respondents and paid a total amount of Rs.12,41,000/- by the Complainant. (Rs.1,00,000/- on 24/03/2014, Rs.11,41,000/- on 25/04/2014 & Rs.53,000/- on 12/05/2014). The Complainant and availed the benefit of an additional amount paid by him by getting a reduction in the total cost.

6. It was further stated that in February 2015, the 1st Respondent has prepared the agreement for construction and sent an email dated 15/02/2015 to the Complainant requesting him to execute the agreement and to pay the balance amount due amounting to Rs.1,71,237/- and tax within 7 days. But the Complainant didn't respond to the said email. In may 2015, the 1st Respondent has completed the plinth of the apartment complex and sent another email dated 15/05/2015 to the Complainant requesting him to execute the agreement and to pay the balance amount due amounting to Rs.7,57,332/-. But the Complainant refused to respond only to avoid payment of above said amount. On 27/06/2016, after a delay of 410 days the Complainant had executed the agreements with the 1st Respondent and paid only Rs.96,238/- and he has failed to pay the balance amount of Rs.6,61,094/- along with interest.

7. The Respondents further submitted that in July 2017, the 1st Respondent has completed construction of the 2nd slab and in October 2017, 4th slab of the apartment complex was completed and sent e-mails dated 20/07/2017 & 11/10/2017 respectively, to the Complainant requesting him to pay the balance amount due amounting to Rs. 12,77,189/-. In January 2018, the 1st Respondent has completed the construction of 6th slab of apartment complex and sent email dated 15/01/2018 to the Complaint requesting him to pay the balance amount due. In March 2018, 1st Respondent



has completed the construction of the 8th slab, in May 2020, 12th slab was completed and in April 2022 the entire structure of the apartment complex was completed and issued e mails on various dates to the Complainant requesting him to pay the balance amount due. But the Complainant has failed to pay any amount to the Respondents.

8. It was further submitted by the Respondents that out of the due amount, the 1st Respondent has paid a total amount of Rs.2,42,655/-, which is not repayable. The Complainant was very irregular in paying the instalments after the booking of the apartment. He has completely defaulted to pay amounts after the completion of the 4th slab. As on 7/04/2022 an amount of Rs.28,00,086/- as cost of the construction and Rs.11,59,245/- as interest totalling to Rs.39,59,331/- was due to the 1st Respondent. Hence the 1st Respondent has sent an email dated 07/04/2022 calling upon the Complainant to pay the said amount and informed that in case of default, the booking will be cancelled and the agreement will be terminated. Even after the receipt of the said mail, the Complainant did not respond and failed to pay the amount. As per clause 18 of the agreement both parties agreed to fix the period of completion of the construction as December 2018, subject to the Complainant fulfilling his obligation as per the agreement and also subject to the situation arising out of factors beyond the control of the builder and force majeure. Due to covid 19 Pandemic, the Authority was pleased to grant one year moratorium in the period for completing the construction. During the said period, the Respondents are not liable to pay any interest / compensation. Hence the Complaint is not entitled to get any interest. He is only entitled to get 90% of the amount without interest after the termination of the agreement. On the other hand the 1st Respondent is entitled to get interest for the defaulted instalments from the Complainant. Copies of said email communications are produced from the part of the Respondents.



9. The Authority heard the learned counsel for both the parties and gave careful consideration to the submissions, and perused the material documents available on record. The documents produced from the part of the Complainant is marked as Exbt.A1 to A11. The documents produced from the part of the Respondents are marked as Exbt.B1 to B10. It was argued by the Respondents that the Complainant had cancelled the agreement before filing of the Complaint vide email dated 15/04/2022, but no document was produced to substantiate the said argument. It was further submitted that the Complainant had paid a total amount of Rs.31,64,618/- to the 1st Respondent, out of which Rs.3,14,442.44 was GST/VAT/ST paid. According to the Respondents, Complainant is not entitled to get back this amount paid to the government and the Respondents had received Rs.28,50,175.56 only towards construction cost. The above arguments cannot be considered as there was a delay in completing the apartments and handing over possession as required under the Act, 2016. It was further submitted by the Respondents that "due to covid 19 Pandemic, the Authority was pleased to grant one year moratorium in the period for completing the construction. During the said period, the parties are not liable to pay any interest / compensation and the Complaint is not entitled to get the interest". The date of completion as promised to the complainant was December 2018, much before the Covid-19 pandemic and the subsequent shut down commenced in the country by March 2020. Hence the Respondents cannot take advantage of the extension granted for completing the project by the Authority as to deny the interest payable to the allottees under section 18 of the Act.

10. As per Exbt.A2, the Construction agreement dated 27/06/2016 executed between the 1st Respondent, represented by the 2nd Respondent and the Complainant, the 1st Respondent



agreed to construct apartment No.502 having a super built up area of 157.81 sq.mtr (1698 sq.ft) in the 5th floor of the residential apartment complex known as 'Elixir Grande Apartments' on the land described in the schedule A of the agreement. Along with the apartment referred above proportionate share over the schedule A Property and in common areas such as passage, lobbies, Lifts, stair case and other areas of common use together with covered car parking space was offered. It is seen from the Exbt.A2 agreement that the Respondents had undertaken to complete the construction on or before December 2018.

11. Exbt.A3 is the copy of payment receipts issued by the Respondents from which, it is clear that the Complainant had paid an amount of Rs.31,64,618/- to the Respondents as cost of apartment No.502 and proportionate share over the land and common areas in the said project. The Respondents have not raised any objection on payments made against Exbt.A2 agreement. In the counter statement filed by the Respondents it was admitted that by April 2022, only the entire structure of apartment complex was completed. Since the Respondents failed to complete the construction as per the agreement before December 2018, the Complainant is eligible to get refund of the amount paid by him under section 18 of the Act, 2016. The details of the payment made to the respondents is as follows:-

<u>Date</u>	<u>Amount</u>
24/03/2014	Rs.1,00,000.00
25/04/2014	Rs.8,46,000.00
25/04/2014	Rs.2,95,000.00
12/05/2014	Rs.53,000.00
22/06/2016	Rs.46,238.00
22/06/2016	Rs.50,000.00



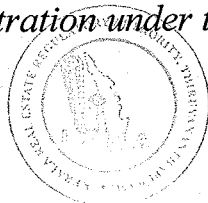
25/08/2017	Rs.5,56,095.00
22/03/2018	Rs.1,06,095.00
12/07/2018	Rs.5,56,095.00
12/07/2018	Rs.5,56,095.00

Total

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Rs.31,64,618.00

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 not 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(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 claim refund of the amount paid with interest, as the promoter failed to complete and is unable to give possession of the apartment as per the agreement.

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 not 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 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 the Act, 2016.

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 present SBI PLR rate is 13.45% with effect from 15/09/2022. The Complainant is entitled to get 15.45% 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.31,64,618/- paid by him along with interest Hence it is found that the Respondent's 1 and 2 are liable to pay Rs.31,64,618/- along with 15.45 % (13.45 (current BPLR rate) +2%) simple interest from the date of receipt of payment by the Respondents.

15. 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.31,64,618/-** to the Complainant with simple interest @ 15.45% per annum from 24/03/2014, till the date of realization.

2. If the Respondents fail 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.

Sd/-
Sri.M.P. Mathews
Member

/True Copy/Forwarded By/Order



Secretary (legal)

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

Ext.A1- Copy of agreement for sale.

Ext.A2- Copy of construction agreement dated 27/06/2016.

Ext.A3 series - Copy of payment receipts.

Ext.A4- Copy of email dated 16/04/2014.

Ext.A5- Copy of e-mail dated 13/02/2015.

Ext.A6- Copy of e-mail dated 15/08/2015.

Ext.A7- Copy of e-mail dated 22/03/2014.

Ext.A8- Copy of building permit issued by the Kaviyoor Grama Panchayat on 12/02/2015.

Ext.A9- Copy of e-mail dated 18/02/2017 issued by the Respondent.

Ext.A10- Copy of approved property value schedule dated 23/03/2014.

Ext.A11- Copy of email dated 20/02/2017 issued by the Respondent.

Exhibits marked from the Side of Respondents

Ext.B1- Copy of e-mail dated 15/02/2015

Ext.B2- Copy of e-mail dated 15/05/2015

Ext.B3- Copy of e-mail dated 20/07/2017.

Ext.B4- Copy of e-mail dated 11/10/2017.

Ext.B5- Copy of e-mail dated 15/01/2018.

Ext.B6- Copy of e-mail dated 14/03/2018.

Ext.B7- Copy of e-mail dated 29/03/2019.

Ext.B8- Copy of e-mail dated 15/05/2020.

Ext.B9- Copy of e-mail dated 06/04/2022.

Ext.B10- Copy of e-mail dated 07/04/2022.

10/11/11

Dear Mr. [Name]
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