KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint No. 288/2020
Dated 13th February, 2023

Present: Sri. P. H Kurian, Chairman,
Sri. M.P. Mathews, Member.

Complainant

Vijayakrishnan Menon,
S/o V.M.K., Menon,
11/158 (New 21/1020)
Sreemangalam House,
Chevayur Post, Kozhicode-673017, Kerala
[By Adv.Radhakrishnan K.]

Respondents

1. M/s Galaxy Homes Pvt. Ltd. (Oxton)
   Galaxy Square, Rajaji Road, Jn. M.G.Road, Kochi.
2. P.A. Jinas
   Managing Director,
   M/s Galaxy Homes Pvt. Ltd. (Oxton)
   Galaxy Square, Rajaji Road Junction. M.G.Road,
   Kochi- 682035
   [By Adv. Thomas John.]

ORDER

1.The Complainant is an allottee of an apartment in the residential apartment project 'Galaxy Oxton' situated in survey No.802 at Ernakulam Village, Kanayannur Taluk, Ernakulam District of which the Respondent No. 1 is the Promoter and the Respondent No 2 is the Managing Director of the 1st Respondent. The above complaint No. 288/2020 was filed by the Complainant seeking following reliefs:- (1) to direct the Respondent to pay an interest @15% on Rs.10,98,983/- which is amounting to Rs.5,76,966/- for delaying the construction period of 42 months and also to entrust the possession of the apartment after its completion along with the legal and other expenses met by the Complainant in this matter (2) to direct the Respondent to pay Rs.2,00,000/- towards the mental agony suffered by the Complainant due to the violation of the terms of the construction agreement (3) to direct the Respondent to pay the rental charges paid by the Complainant from 05/06/2019 till date amounting to Rs.2,25,000/- due to the delay in completing the construction of the residential flat mentioned in the construction agreement. In the said Complaint, after hearing both parties in detail and examining the documents produced, the Authority passed order dated 15-11-2021, that "the Respondent/Promoter shall complete the entire works of the project "Galaxy Oxton" with all the common amenities and facilities as offered to the Complainant in accordance with the agreement and hand over

possession of the apartment as per the terms of the agreement executed with the Complainant on **or before 30/12/2021** without fail." The case then posted to 12-01-2022 for hearing interest claim.

2. When it came up for hearing on 12.01.2022 and subsequently on 28.02.2022 and 17.03.2022 the Complainant and his counsel raised allegations that the Respondent/Promoter has not yet completed the works as per the direction of the Authority, vide order dated 15-11-2021 but no execution petition was filed by the Complainant which was specifically pointed out by the Authority to the Counsel appearing for the Complainant during the hearing on 28.02.2022. It was also noticed that even though the Respondents claimed during the above hearing that all the works have been completed, they had not submitted any compliance Report before the Authority.

3. On 01.09. 2022, the Authority received an affidavit dated 04.04.2022, sworn by the 2nd Respondent in which it was stated that, as per the direction of the Authority, the works of the project were completed before 30.12.2021 and a meeting of the allottees of the project was convened on 21.12.2021 for the formation of Association. The owners including the complainant had abstained from attending the meeting and hence the Association could not be formed. It was further stated in the affidavit that the occupancy certificate was obtained on 31.12.2019 and the apartment No. H-7 of the Complainant was ready for handing

over and the matter was intimated to the Complainant. He was directed to settle the final bill of Rs. 4,64,900/- and take possession of the apartment. The sale deed in favour of the Complainant was executed on 27.06.2015 itself in order to avail bank loan by the Complainant. The door numbers were issued by the Corporation and this was also intimated to the Complainant vide e-mail dated 04.06.2020. Presently, 37 allottees are occupying the apartments in the project. The Complainant has not come to settle the final bill and take possession till this date in spite of directions from the Authority and there is no wilful omission on the part of the Respondent and hence the penalty may not be ordered against him.

4. The Counsel for the Complainant argued that the actual balance amount payable by the Complainant is only Rs 2,45,924/- and the additional amount demanded by the Respondent /Promoter as additional GST and other capital expenditure connected with KSEB deposit etc. is against clause 4 of the agreement. As per clause 3 of the agreement, total amount payable is inclusive of service tax is Rs.13,44,907/- The counsel for the Complainant repeatedly alleged that the amenities offered to the Complainant are still not completed by the Respondent/Promoter.

5. Thereafter, the Complainant filed I.A. No. 168/2022, stating that the calculation of interest as per the complaint is having some errors which is to be revised and the present petition is to

be considered as the claim for interest for delay in completion and handing over the apartment allotted to him. The revised calculation statement submitted by the complainant is as follows:-

Total amount paid for construction up to 31-12-2016		Rs.10,98,983.00
1	Interest @ 12.75%(BPLR) from 01-01-2017 to 31-12-2017	Rs.1,40,120.33
2	Additional Interest @2% from 01-01-2017 to 31-12-2017	Rs. 21,980
3	Interest @ 7.75%(BPLR) from 01-01-2018 to 31-12-2018	Rs.1,40,120.33
4	Additional Interest @2% from 01-01-2018 to 31-12-2018	Rs. 21,980
5	Interest @ 12.75%(BPLR) from 01-01-2019 to 31-12-2019	Rs.1,40,120.33
6	Additional Interest @2% from 01-01-2019 to 31-12-2019	Rs. 21,980
7	Interest @ 12.75%(BPLR) from 01-01-2020 to 31-12-2020	Rs.1,40,120.33
8	Additional Interest @2% from 01-01-2020 to 31-12-2020	Rs. 21,980
9	Interest @ 12.75%(BPLR) from 01-01-2021 to 31-12-2021	Rs.1,40,120.33
10	Additional Interest @2% from 01-01-2021 to 31-12-2021	Rs. 21,980
11	Interest @ 12.75%(BPLR) from 01-01-2022 to 28-10-2022	1,15,551.29
12	Additional Interest @2% from 01-01-2022 to 28-12-2022	18,125.69
	Total	9,44,178.63

6. The Respondent/Promoter has not filed any Counter Affidavit to the interlocutory application (IA.168/2022). During the hearing, the Counsel for the Respondent kept on submitting that the matter is almost settled. The Complainant and his Counsel submitted that they are ready to take possession of the apartment. But at the time of hearing on 12.10.2022, the Counsel for the Respondent submitted that possession shall be handed over only after settlement of all the claims of the complainant including that for the interest for delay. During the final hearing on 09.11.2022 also, the counsel for the Respondent requested further time for settling the matter but the Authority has taken it for orders, allowing time up to 25-11-2022, for reporting settlement, if any. But the Complainant vide Communication dated 26-11-2022, reported that the matter is not settled and requested to pass orders on I.A. 168/2022.

7. As per Order of the Authority on 28-02-2022, the Respondent /Promoter was directed to register the project, and the builder applied for registration on 27-06-2022, but the same is pending for want of further documents from the side of the Respondent /Promoter.

8. After hearing the counsels on either side and perusing the pleadings and documents submitted by both the parties with respect to the claim of the Complainant for interest for delay, following points were came up for consideration:

1) Whether the Respondent/Promoter failed to complete and hand over possession of the apartment to the Complainant in accordance with the terms of the agreement for sale or not?

2) Whether the Complainant herein is entitled to get interest as provided under the proviso to Section 18 (1) of the Act 2016 or not?

3) What order as to costs?

1. <u>Points No. 1&2</u>: The relief sought in the I.A. 168/2022 is for direction to pay interest for delay in completion and handing over the apartment allotted to the Complainant, According to Section 18(1) of the Real Estate (Regulation & Development) Act 2016 [hereinafter referred to as "the Act 2016"], "*<u>If the promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein</u>; he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act-*

Provided that where the allottee does not intend to withdraw from the project, he shall be paid by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed." It is obvious that Section 18(1) is applicable in cases where the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale duly completed by the date specified therein. Moreover, Section 18 (1) of the Act clearly provides two options to the allottees viz. (1) either to withdraw from the project and seek refund of the amount paid with interest and compensation (2) or to continue with the project and seek interest for delay till handing over of possession. Here the Complainant has opted to continue with the project and claimed interest for delay in handing over the apartment to him.

9. The copy of Letter of allotment dated 07-05 2014 issued by the respondent in favour of the complainant is marked as **Exhibit A1.** In the said allotment letter the cost of apartment is shown as Rs 12,45,930/- water and electricity connection, deposit and service charges is Rs. 1,20,000/- totaling to Rs.13,65,930/- it is further stated that one time building property tax for apartment and service tax and any tax implemented by the Government in due course, contribution for Workers Welfare Fund connected with the apartment shall be exclusively met by the Complainant. It is also stated in the allotment letter that on signing the

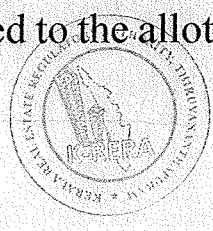
agreements by both the parties the letter of allotment stands null and void and thereafter, the booking is governed by the clause and conditions in the agreement for construction and agreement for sale prevailing at that point of time. **Exhibit A2**, is the copy of Agreement for sale dated 20-08-2014, entered into between the 1st Respondent represented by the 2nd Respondent and the Complainant. As per this agreement the cost of undivided share of land is shown as Rs.1,78,500/-and there is no dispute with regard to it. **Exhibit A3** is the copy of agreement for construction dated 20-08-2014, entered in to between the 1st Respondent represented by the 2nd respondent, its Managing Director, and the Complainant, for the construction of one bedroom Flat number H-7 having a super built-up area of 357 sq. ft on the 7th Floor of the residential apartment complex known as 'Galaxy Oxton' with car parking and the right to use the common area and common facilities provided in the said property referred to in Schedule A. As per this agreement construction cost is shown as Rs.13,44,907/-including service tax and VAT. Relevant portions of Clause 3 and 4 of the agreement for construction entered in to between the Respondent/ Promoter as First Part and the Complainant as Second Party is extracted below:-

"*The amounts shown in payment schedule is inclusive of service tax of Rs. 61,599/- (Rupees Sixty one thousand five hundred and ninety nine only) at the prevailing rate of 4.944% and VAT of Rs. 37,378/- (Rupees Thirty seven thousand three hundred and*

seventy eight only) at the prevailing rate of 3% and the second party shall pay the instalment amounts at such higher rates if and when the rate of service tax or VAT are increased by the governments at any point of time.

4. All taxes including building tax, one time building tax, property tax for the apartment and any taxes implemented by the Government in due course, contribution for Workers' Welfare Funds and all expenses including stamp duty, and registration fee and expenses for the preparation and registration of deeds connected with the said apartment and all service charges shall be exclusively met by the Second Party without making the First Party in any way liable for the same. Stamp duty and penalty if any with respect to this agreement shall be exclusively born by the Second Party without making the First Party in any way liable for the same."

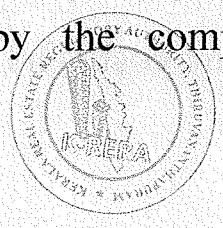
10. No where in the agreement it is stated that the construction cost is inclusive of water and electricity connection deposit and service charges. Hence it is to be presumed that the construction cost of Rs.13,44,907/- as per the agreement and the water and electricity connection deposit and service charges of Rs. 1,20,000/- is to be paid over the total construction cost of Rs 13,44,907/-. This is reinforced by the calculation statement forwarded by the complainant by email dated 8-7-2020 to the respondent which is marked as **Exhibit A5.** In this calculation the complainant has referred to the allotment letter dated -07-05-



2014 (ExhibitA1), that cost of construction is Rs 12,45,930/- and 1,20,000 is the electricity water and deposit fees.

11. **Exhibit A4** is the copy of sale deed dated 27-06-2015, executed by the respondent in favour of the complainant. As per the sale deed the total consideration for the land is shown as Rs. 1,78,500/- and the value of building as Rs. 3,57,000/-. As per said sale deed, 357/5500 share in all that land having 13 Ares of land in survey No 802/3 in Kadavanthara desam in Elamkulam Village, Kanayannur Taluk, Ernakulam District, made up of 8.09 Ares more particularly described in sale deed No 3797/2014 and 4.91 Ares more particularly described in sale deed No 3797/2014 both registered in SRO Ernakulam together with one bed room incomplete apartment No H-7 having a super built area of 33.17 Sq. Meters on the seventh floor of GALAXY OXTON and right to use proportionate share in the common areas and common fecilities and together with right of way over the said private roads up to the public road for all kinds of traffic and for taking all kinds of connections, were transferred to the complainant. As per clause 5 of the **Exhibit A3** construction agreement, the construction work had to be completed before **30-06-2016**, and possession had to be handed over within 180 days from the date of paying the entire consideration including statutory charges. The Complainant has paid an amount of Rs. 1,78,500/-for the undivided share of land purchased and Rs 10,98,983/- for construction cost. The copy of occupancy certificate dated 31-

12-2019 issued by Kochi Municipal Corporation is produced by the Respondent and marked as **Exhibit B1**. The respondent had intimated the receipt of **Exhibit B1** through e mail dated 4-6-2020 which is marked as **Exhibit B2**. **Exhibit B2** was the email dated 04-06-2020 issued by the respondent to the complainant, as per which the respondent had intimated the receipt of occupancy certificate. Under section 19 (10) of the Real Estate (Regulation and Development) Act, 2016 every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be. Since the allotee refused to take possession even after the receipt of occupancy certificate was intimated through **Exhibit B2,** by paying the balance amount due, the allottee cannot claim delay interest by creating a dispute on the balance payment due. The respondent had expressed his desire to hand over the apartment subject to settlement of the balance amount of Rs. 4,64,900/- However, vide **Exhibit A5**, and **ExhibitA6** the complainant disputed the total amount payable and arrived at a balance payment of only Rs 2,45,924/-. **Exhibit A5** is the copy of email dated 08-07-2020 issued by the complainant to the respondent, as per which the complainant admitted that the total amount payable is Rs. 13,65,940/- against which Rs. 10,98,983/- was paid to the respondent. **Exhibit A6** was the copy of Lawyer notice issued on 08-07-2020 by the complainant to the



respondent. In **ExhibitA6** lawyer notice, it is stated that the date of completion after considering the grace period of six months was 31-12-2016. The **Exhibit A6** legal notice also refers to **Exhibit A5** claiming compensation due to the deficiency of service. On going through **Exhibit A5 and Exhibit A6** it is clear that the apartment was completed and ready for handing over after the receipt of the occupancy certificate and the complainant was willing to take over the possession, provided the compensation as claimed was paid by the respondent after adjusting the balance payment due from the complainant. The date of completion as per Section 18 of the Act is therefore to be considered as 8-7-2020 and the promised date of handing over was 31-12-2016. Therefore, delay interest as per Section 18 of the Real Estate (Regulation and Development) Act, 2016, due to the complainant, is from 01-01-2017 to 08-07-2020.

12. The only dispute remaining is what is the actual, payment to be made by the complainant to the Respondent/ Promoter. On going through the agreements and other exhibits produced by the complainant and the Respondent/ Promoter the Authority has come to the conclusion that Rs 13,44,907/- is the construction cost including service tax and VAT. The electricity water and deposit fees is Rs. 1,20,000/- as admitted by the complainant in **Exhibi A5**. Total amount payable by the complainant is Rs 14,64,907/- amount paid by the complainant is Rs 10,98,983/-

and therefore a balance payment due from the complaint to respondent is Rs. 3,66,014/-

13. As per Section 18(1) of the Real Estate (Regulation and Development) Act, 2016, the complainant is eligible to claim from the promoter interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. The allottee ought to have paid Rs. 2,45,924/-plus Rs.1,20,000/- as admitted and ensured that he had completed his obligation. Since the balance amount has not been paid, the claim is restricted to a period up to 08-07-2020. Hence the delay interest is calculated from 01-07-2017 to 08-07-2020. No where in the pleading or in the legal notice, the details of balance work to be completed with respect to the apartment or the common amenities were mentioned. Possession of the apartment is not yet handed over even after the direction of the authority vide order dated 15-11-2021. The dispute is only regarding the balance payment due.

14. In respect of the dispute raised by the Complainant with respect to the demand of the Respondent/promoter for an additional amount towards GST and other charges, Clause 3 of **Exhibit A3** Construction agreement dated 20.08.2014 is seen states that "the amounts shown in the payment schedule is inclusive of service tax of Rs. 61,599/- at the prevailing rate of 4.944% and VAT of Rs. 37,378/- at the prevailing rate of Rs. 3% and the Second Party shall pay the installment amounts at such

higher rates if and when the rate of service tax or VAT are increased by the Government at any point of time." The agreement has confirmed that the rates are inclusive of service tax and VAT and no further claim can be made by the respondent unless and until there is any change in the rates before the promised date of completion by the respondent. Points No. 1 &2 are answered accordingly in favour of the Complainant.

15. The Rule 18 (1) of the Kerala Real Estate (Regulation and Development) Rules, 2018 prescribes the annual rate of interest payable by the promoter to the allottee as SBI PLR plus 2%, to be computed as simple interest. The present SBIPLR rate is 14.15%. The complainant has limited claim to 12.75% plus 2%. As per the claim petition, the Complainant seeks monthly interest on the amount of Rs. 10,98,983/- paid by him as on 31.12.2016, at the rate of 12.75% + 2%. It is to be noted that the payment due to the complainant is more than the payment to be made by the Complainant and as such the possession of the apartment shall be handed over forthwith to the Complainant without any further payment by the Complainant.

16. The authority after going through the facts and circumstances of the case and the documents produced by the Complainant and the Respondent/ Promoter by invoking Section 37 of the Real Estate (Regulation & Development) Act, 2016 hereby directs as follows:

1) The Respondent shall hand over possession and the Complainant shall take over possession of the apartment transferred vide sale deed (Exhibit A4) within 15 days on receipt of this Order and the Respondent shall arrange to obtain ownership certificate of the apartment transferred in to the name of the Complainant.

2) The Respondents shall pay to the complainant interest @14.75% simple interest for every month of delay on Rs. 10,98,983/- paid by the Complainant to the Respondent from, 01/01/2017 to 08-07-2020, after deducting the amount due from the complainant of Rs 3,66,014/-

3) If the Respondent fails to pay the aforesaid sum as directed above within a period of 60 days from the date of receipt of this order, the Complainant is at liberty to recover the aforesaid sum from the Respondents No. 1 & 2 and their assets by executing this decree in accordance with the Real Estate (Regulation & Development) Act and Rules.

Sri.M.P. Mathews
Member

Sri. P H Kurian
Chairman

True Copy/Forwarded By/Order/

Secretary (Legal)

APPENDIX

Exhibits submitted by the Complainant

Exhibit A1- Copy of Letter of allotment dated 07-05 2014 issued by the respondent in favour of the complainant.

Exhibit A2- Copy of Agreements for sale dated 20-08-2014, entered into between the Respondent and the Complainant.

Exhibit A3- Copy of agreement for construction dated 20-08-2014, entered in to between the Respondent and the Complainant.

Exhibit A4- Copy of sale deed dated 27-06-2015, executed by the respondent in favour of the complainant.

Exhibit A5- Copy of email dated 08-07-2020 issued by the complainant to the respondent.

Exhibit A6- Copy of Lawyer notice issued on 08-07-2020 by the complainant to the respondent.

Exhibits submitted by the Respondnant

Exhibit B1-Copy of occupancy certificate dated 31-12-2019 issued by Kochi Municipal Corporation.

Exhibit B2- Copy of email dated 04-06-2020 issued by the respondent to the complainant.