KERALA REAL ESTATE REGULATORY AUTHORITY

THIRUVANANTHAPURAM

Complaint No. 92/2022

Present: Sri. M. P Mathews, Member

Dated 24th August, 2023

Complainants

1. Annie Saji,
   Kakkattumattathil House, Velloor,
   Puthencruz P.O, Ernakulam-682308.

2. Saji Varghese Kakkattumattathil,
   Kakkattumattathil House, Velloor,
   Puthencruz P.O, Ernakulam-682308.

(By Adv. Saji Vargheese)

Respondents

1. National Buildings Construction Corporation(NBCC)
   Represented by its Chairman/Managing Director,
   NBCC Bhawan, Lodhi Road, New Delhi- 110003

2. General Manager
   NBCC Bhawan, Lodhi Road,
   New Delhi- 110003.

(By Adv. Aneesh James)

The above Complaint came up for virtual hearing today. The Counsel for the Complainant and counsel for the Respondents attended the hearing.

ORDER

1. The case of the Complainant is as follows:- the Complainants are the allottees of project named 'NBCC VALLEY VIEW APARTMENTS' at Karimukal Near Ambalamedu, Ernakulam developed by the Respondents. Taking note of the fact that the 1st Respondent is a Government of India undertaking, the Complainants have booked a flat in the said project conceived by the Respondents and thereby paid an amount of Rs.2,00,000/- as application money. On receipt of the application money, the Respondent issued a letter allotting a flat as Type -V Apartment in the 3rd floor of the said project bearing No. A-301. The total cost of the apartment as per the allotment letter is Rs.54,57,669/-. On 01/12/2014, the Complainants have paid Rs.3,60,286/- to the Respondent. The Complainants were planning to pay the instalments availing loan from the bank. They approached many banks for loans. But none of the banks approved the project of the Respondents. Hence the Complainants could not remit the future instalments.

2. The details of the payment made to the respondent is as follows:-

Date	Amount
Application money	Rs.2,00,000.00
01/12/2014	Rs.3,60,286.00
Total -	**Rs.5,60,286.00**

3. The project was expected to be completed in the year 2016. The Complainants on many occasions approached the Respondents for completing the flat and to hand over the same to the Complainants. Though

the Respondent completed the structural works, they have not completed the finishing works so far. Now the Complainants understood that the Respondent has abandoned the project and the buildings are not attended by anybody and the building is deteriorating day by day. Since the Respondent has no plan to complete the project Complainant has no option other than to ask for return of the amount paid by the Complainant with its interest. The Respondent is bound to return the entire amount together with interest collected from the Complainant. Copies of allotment letter and payment receipts are the documents produced from the part of the Complainant.

4. The reliefs sought by the Complainant is refund of Rs.5,60,286/- together with 12% interest from the date of payment.

5. The Respondents have filed written statement and denied the averments in the Complaint and stated that the Respondents had obtained building permit No.BA-103/09-10 dated 12/4/2010 as well as the consent to establish dated 28/07/2010 from the Kerala State Pollution Control Board for the said project. The Complainants have submitted application dated 23/06/2014 seeking allotment of apartment and had given his consent to the terms and conditions set out by NBCC (INDIA) Ltd. It was further submitted that the Complainants have applied for allotment of an apartment in the project 'NBCC Valley View Apartments' by paying application money of Rs.2,00,000/-. The said application was accepted and the Complainant was allotted Apartment No.A301 vide allotment letter dated 28/10/2014. The total cost of the apartment allotted to the Complainant was Rs.54,57,669/- excluding VAT. The allotment to the Complainant was subject to the Complainant paying the allotment money of Rs.3,60,286/- on or before 12/12/2014. The Complainants paid an amount of Rs.3,60,300/- by way of demand draft dated 26/11/2014. However, after the payment of allotment

money, the Complainants have failed to remit even a single instalment towards the cost of the apartment. Thus the Complainants have paid a total amount of Rs.5,60,300/-. Even though timely reminders were given to the Complainants about the achieving o milestones and payment of instalment money, there was no response from the Complainants.

6. The Respondents further submitted that the tentative date of handing over of possession of the apartment conveyed to the Complainant was three years from the date of allotment. The works in the project had progressed more or less as per the schedule and 95% of the work in 5 blocks under phase I of the project has been completed by January 2018. The Respondents could not further proceed with the work as when the Respondents had applied for renewal of the consent to establish to the Kerala Pollution Control Board, the Respondents were informed that consent to establish can be renewed only if the Respondents obtain environmental clearance for the project. The Respondents already submitted the requisite application for obtaining environmental clearance and the same is under process. The work on the project came to a stand still since February 2018 for want of the requisite statutory approvals. The only works that is remaining is the external services like STP, Sewer connections, water supply connections, painting, external electrification works etc., in addition to the testing and commissioning of lifts, transformers and DG sets. The Respondents are unable to proceed further and complete the remaining 5% of the work on the project on account of the delay in obtaining environmental clearance from the MOEF. The building already constructed is well attended to and protected by the employees of the 1st Respondent.

7. The Respondents further submitted that the Respondent has already intimated the Complainant vide communication dated 05/05/2022 that they are unable to handover possession of the allotted

flat to the Complainant on account of non-availability of statutory approvals and had offered full refund to the Complainant in terms of the agreement. A further communication dated 08/06/2022 was also issued to the Complainant intimating them that even though they are defaulters, the Respondents are willing to refund the amounts paid by the Complainants. However no response was forth coming on the part of the Complainants. The Complainant was a defaulter and had committed defaults in the timely payment of all instalments, which has severely affected the cash flow of the Respondents and adversely affected the progress of the work. Hence the Complainant is not entitled to any interest on the amounts paid to the Respondents.

8. The Authority vide order dated 26/07/2022 directed the Respondents to return the amount of **Rs.5,60,286/-** to the Complainant with simple interest @ 14.75 % per annum on each payment from the date as shown in the statement, till the date of realization. The Respondents challenged the above Order before the Honourable Appellate Tribunal and the order of the Authority was upheld. The Hon'ble Appellate Tribunal vide order dated 28/02/2023 dismissed the appeal filed by the Respondent by confirming the orders passed by K-RERA, however with a clarification that the rate of interest on the principal amount as ordered by the K-RERA shall be payable from the date of respective payments as evidenced by the ledger entries maintained by the promoter, and in case of any dispute, the dates shall be verified by the K-RERA during execution. The parties shall bear their respective costs.

9. The Hon'ble High Court in MSA No.11/2023, set aside the above orders of the Authority and Appellate Tribunal. The Complaints were remanded back to the Real Estate Regulatory Authority for fresh consideration and decision, regarding the claim for set off. Parties were

at liberty to adduce necessary evidence. Hence the parties were heard on 03/07/2023 as directed by the Hon'ble High Court.

10. An Additional written statement was filed by the Respondents after the Hon'ble High Court had passed an order on 29/05/2023 directing this Authority to consider the matter afresh by treating the claim made by the builder in the written statement as the claim for set off against the claim made by the Complainants in Complaint No.92/2022. The additional written statement was filed by the Respondents on 21/07/2023, without any direction from the Hon'ble High Court to receive the additional written statement nor an application to receive the same before this Authority. However considering the fact that that this Authority did not want to shut down any evidence, decided to accept the additional written statement and also the statement filed by the Complainant on 24/07/2023. The claim made against the Complainant for set off states that the Complainants are liable to pay interest on the defaulted amounts to the Respondents . According to the Respondents the payments defaulted by the Complainant as on 31/01/2017 comes to Rs.43,22,098/- and the Respondents are entitled to interest on the said amount from the date of respective defaults till February 2018, the date till which the Respondents had proceeded with the Construction.

11. The counter claim as per Para 9 of written statement in C No.92/2022 is extracted " The Complainant was a chronic defaulter and had committed defaults in the payment of all instalments, which has severely affected the cash flow of the Respondents and adversely affected the progress of the work. Hence the Complainant is not entitled to any interest on the amounts paid to the Respondents and is liable to compensate the Respondents for the non-payment of instalments in time. Even then the Respondents had still offered full refund to the Complainant".

12. According to Order 8 Rule 1 A of CPC 'Where the defendant bases his defence upon a document or relies upon any document in his possession or power in support of his defence or claim for set off or counter claim, he shall enter such documents in a list and shall produce in court when the written statement is presented by him and shall at the same time deliver the document and copy thereof to be filed with the written statement".

13. Order 8 Rule 6 A states that "A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not": Order 8 Rule 9 of CPC specifies that no pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter claim shall be presented except by the leave of the court and upon such terms as the courts thinks fit.

14. The Authority on 26/07/2023 finally heard the learned counsels, gave careful consideration to their submissions, and perused the material documents available on record. The documents produced from the part of Complainant is marked as Exbt.A1 & A2. The Complainant has not produced any agreement for sale or construction executed between the Complainant and the Respondent. **Exbt.A1** is the allotment letter issued by the Respondents regarding allotment of Type V Apartment No.A204 on the second floor having an area of 1788 square area along with one parking slot.

Exbt.A2 is the copy of payment receipt dated 01/12/2014 issued by the Respondents to the Complainant evidencing the payment of allotment money.

15. The documents produced by the Respondents are marked as Exbt.B1 to B16. **Exbt.B1** is the copy of the application for allotment dated 23/06/2014 submitted by the Complainant with general terms and conditions of allotment agreed by the Complainant. **Exbt.B2** is the allotment letter dated 28/10/2014 issued by the Respondents to the Complainant regarding allotment of apartment No.A301 in the third floor of the project. **Exbt.B3** is the copy of communication dated 25/04/2016 issued to the Complainants intimating the payment date of 2nd instalment. **Exbt.B4** is the copy of communication dated 12/07/2016 issued to the Complainant intimating the payment date of 3rd instalment. **Exbt.B5** is the copy of communication dated 29/08/2016 issued to the Complainants intimating the payment date of 4th instalment. **Exbt.B6** is the copy of communication dated 16/12/2016 issued to the Complainants intimating the payment date of 5th instalment. **Exbt.B7** is the copy of payment details maintained by the Respondents of the payments received from the Complainant. **Exbt.B8** is the copy of payment ledger maintained by the Respondents with respect to the Complainant. **Exbt.B9** is the copy of communication dated 05/05/2022 issued to the Complainant intimating that few statutory approvals from the concerned authority are still in progress, due to which the Respondents have been unable to hand over the possession of the flat and thereby given an opportunity to the Complainant of full and final refund of the amount paid by him without any interest and requested him to convey his consent within 15 days from the date of this notice. **Exbt.B10** is the copy of letter dated 08/06/2022 issued to the Complainant reminding him to submit necessary documents at the earliest in order to issue the refund. **Exbt.B11** is the building permit dated 12/04/2010 issued by Vadavukadu Puthencruze

Panchayat, **Exbt.B12** is the copy of renewal application dated 14/12/2020 submitted to Vadavucode-Puthencruz Grama Panchayath. **Exbt.B13** is the copy of consent to establish dated 28/07/2010 issued by the Kerala State Pollution Control Board. **Exbt.B14** is the copy of consent to establish renewal order dated 05/09/2014 issued by the Kerala State Pollution Control Board. **Exbt.B15** is the copy of communication dated 20/07/2018 issued to Kerala State Pollution Control Board. **Exbt.B16** is the copy of letter dated 15/03/2021 issued to the State Environment Impact Assessment Authority regarding the submission of challan as processing fee for the said project.

16. As per Exbt.B1 application for allotment submitted by the allottee dated 05/07/2014, general terms and conditions clause 39, it is made clear by the Promoter that real estate Regulation (control) bill is likely to be tabled in the parliament of India for passing of the same as an Act. If due to that act, there is any change in the structure of terms of this sale including but restricted to amendments to super area, carpet area, built up area etc. all the recommendations which needs to be incorporated shall be so incorporated in this agreement / or a revised agreement and the allottee shall have no objection to the same so long as the transaction to the apartment applied for and other terms and conditions remain the same. It may involve restructuring / or rewriting the agreement with the proportionally increased price on carpet area basis or built up area basis or revision of method, terms or price payable on any other basis for compliance of the terms, act, bye – laws of the said act but the total price payable for this apartment and other terms and conditions contains herein shall remain unchanged. It is therefore clear that the promoter was aware that the bill shall be passed by the Parliament and accordingly on 01/05/2016 some sections of the Act, 2016 was notified and on 01/05/2017 all sections were notified. The Kerala Real Estate(Regulation and Development) Rules were notified on 14/06/2018. The

real estate project promoted by the respondent is registered with this Authority. (Reg.No.K-RERA/PRJ/ERN/138/2022).

17. As per the allotment letter issued to the Complainant the sixth instalment was payable on 28/10/2016 within 24 months of allotment or completion of fixing those windows and flooring all residential blocks which ever is later. The tentative date of payment of the 2nd instalment is within 9 months of allotment or completion of 3rd floor roof slab of any 6 residential blocks which ever is later. The 4th instalment is payable within 15 months of allotment or completion of 6th floor roof slab of top habitable floor of any 6 residential plots, which ever is later. The 5th instalment is payable within 21 months of allotment or completion of top habitable floor of any six residential blocks whichever is later. According to the Complainant the date of completion was 28/10/2016. The Complainant had paid the 1st instalment on 01/12/2014.

18. The promised date of completion was 28/10/2016 and the allottee did not make any payment after 01/12/2014. It is evident that the consent to establish renewal order dated 05/09/2014 issued by the Kerala State Pollution Control Board that condition No.5 & 6 of the said document, clearance from MOEF/SEEC for the project not obtained. The Complainant had planned to pay the instalments by availing loans from the bank, but none of the banks agreed to provide loan for the reason that the Respondents did not have clearance from MOEF. The Respondents had wilfully and deliberately suppressed the fact from the Complainant that there was no clearance at the time of booking. According to Section 19(1) of the Act, it was the responsibility of the Respondent to provide the relevant information to the allottee at the time of booking and the Respondent, miserably failed in disclosing the approvals received for the real estate project. Section 19 (1) of the Act 2016 stipulates *that "The allottee shall be entitled to obtain the*

information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter". The Respondent / Promoter failed in providing all information related to the project to the Complainant / Allottee.

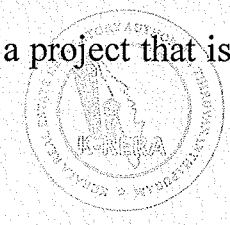
19. According to the Respondent the works in the project had progressed more or less as per the schedule and 95% of the work in 5 blocks under phase 1 of the project has been completed by January 2018. The allotment letter dated 28/10/2014 payment schedule states that the 2nd instalment is due within 9 months of allotment or completion of 3rd floor roof slab or any 6 residential blocks which ever is later. After having admitted that only 5 blocks under phase 1 of the project is completed by January 2018 the Respondent has no right to claim the allottee is defaulter by adding a clause in the instalment details "which ever is later".

20. The Hon'ble Supreme Court in M/s Newtech Promoters and Developers Pvt. Ltd., V. State of UP & Others (2021 KHC 6692) had observed as follows "The further submission is made by the learned counsel for the Appellants that if the allottee has defaulted the terms of the agreement and still refund is claimed which can be possible, to be determined by the adjudicating officer. The submission appears to be attractive but is not supported with legislative intent for the reason that if the allottee has made a default either in making instalments or made any breach of the agreement, the promoter has a right to cancel the allotment in terms of S.11(5) of the Act and proviso to sub-S.5 of S.11 enables the allottee to approach the regulatory authority to question the termination or cancellation

of the agreement by the promotor and thus, the interest of the promoter is equally safeguarded".

21. It is therefore clear that the only option available to the promoter upon default by the allottee is to cancel the allotment in terms of Section 11 (5) of the Act, 2016. It is true that the Allottees are bound by Section 19(6) and 19(7) and the promoter can claim interest, in case the promoter decides not to cancel the allotment, after obtaining Occupancy Certificate for the real estate project. Section 19(6) stipulates that " *Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any"* Section 19(7) stipulates that *"The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6)".*

22. Section 19(10) states that "*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".* As per section 17(1) the Promoter shall execute a registered conveyance deed in favour of the allottee within 3 months from the date of issue of Occupancy certificate. The promoter shall intimate the receipt of the occupancy certificate to the allottees along with the balance payment due against the agreement for sale executed, and the defaulted amount and interest can be claimed, only after receipt of the occupancy certificate for a project that is delayed beyond the promised date



of completion. If the allottee refuses to settle the payment, the same can be claimed under Section 19(6) & 19(7) of the Act, 2016. However claiming interest on defaulted payments for an abandoned project was not the legislative intent of the law makers.

23. In the prescribed format of agreement required under Rule 13(2) of Rule 10 Annexure A clause 9.3, "The Allottee shall be considered under a condition of Default, on the occurrence of the following events: (i) In case the Allottee fails to make payments for consecutive demands made by the Promoter as per the Payment Plan annexed hereto, despite having been issued notice in that regard the allottee shall be liable to pay interest to the promoter on the unpaid amount at the rate specified in the Rules.(ii) In case of Default by Allottee under the condition listed above continues for a period beyond consecutive months after notice from the Promoter in this regard, the Promoter shall cancel the allotment of the [Apartment/Plot] in favour of the Allottee and refund the amount money paid to him by the allottee by deducting the booking amount and the interest liabilities and this Agreement shall thereupon stand terminated. This option available to the promoter was not utilised and therefore the allottee is entitled to withdraw from the project and claim refund and interest under Section 18 of the Act, 2016 on a project that is admittedly abandoned. From the email correspondence between the parties it is clear that the Respondent was willing to refund the amount paid by the Complainant, but failed to do so till the Complaint was filed.

24. Hence, the Complainant herein is entitled to get the refund of the amount paid to the Respondent 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 14.85% with effect from 15/03/2023. The Complainant is entitled to get 16.85% 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. Hence it is found that the Respondent's are liable to pay Rs.5,60,286/- along with 16.85 % simple interest on each payment made to the Respondent as per the statement given above and sought for by the Complainant.

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

1. The Respondents shall return the amount of **Rs.5,60,286/-** to the Complainant with along with simple interest @ 16.85 % per annum on each payment made by the Complainant to the Respondent from the date as shown in the statement above, as admitted by the Respondents till the date of realization.

2. If the Respondents fails to pay the aforesaid sum as directed 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 their 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 allotment dated 28/10/2014.

Ext.A2 - Copy of payment receipt dated 01/12/2014.

Exhibits marked from the Side of Respondents

Ext.B1 - Copy of application for allotment submitted by the Complainant 23/06/2014.

Ext.B2 - Copy of allotment letter dated 28/10/2014.

Ext.B3 - Copy of communication dated 25/04/2016.

Ext.B4 - Copy of communication dated 12/07/2016.

Ext.B5 - Copy of communication dated 29/08/2016.

Ext.B6 - Copy of communication dated 16/12/2016.

Ext.B7 - Copy of payment details.

Ext.B8 - Copy of payment ledger maintained by the Respondents.

Ext.B9 - Copy of communication dated 05/05/2022.

Ext.B10 - Copy of communication dated 08/06/2022.

Ext.B11 - Copy of building permit dated 12/04/2010.

Ext.B12 - Copy of renewal application dated 14/12/2020.

Ext.B13 - Copy of consent to establish dated 28/07/2010 issued by Kerala Pollution Control Board.

Ext.B14 - Copy of consent to establish Renewal order dated 05/09/2014 Issued by the Kerala State Pollution Control Board

Ext.B15 - Copy of communication dated 20/07/2018 sent to Kerala State Pollution Control Board

Ext.B16 - Copy of communication dated 15/03/2021 sent to State Environment Impact Assessment Authority.