KERALA REAL ESTATE REGULATORY AUTHORITY
THIRUVANANTHAPURAM

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

Complaint No. 94/ 2020
Dated 31st July 2023

Complainant

1. O2 Zone Apartments Owners Association
   Represented by Smt. Ardra Kurien,
   Door No: TR/VII/39, O2 Zone Apartments
   Vikasavani Junction, Thengode P.O
   Kakkanad, Ernakulam.

   [Adv. Paul Kuriakose.K,]

Respondents

1. M/s.Bayshore Seawood Projects
   52/3203, KK Road
   Kumaranasan Junction,
   Kaloor, Kochi-17

2. Sri.P.V Rajeevan
   Flat 10D1, Moonstone, Manjooran Apartments
   Thammanam Road, Palarivattom, Kochi

3. Sri. Tajan Cyril
   Kalliyath House, House No. 33/1455-B
   Kaniyaveli Road, Vennala P.O
   Kochi-28
   [Adv. Alex M. Scaria and Saritha Thomas]

4. Seawood Constructions Company Pvt Ltd
   Ramachandran Nivas, Sector 12 A
   Kopar Khairane, Navi Mumbai, Maharashtra

5. Jacob Oommen,
   P31, RHS-5, Sector 7
   Vashi, Navi Mumbai 400703.

6. Rajan P Abraham
   Door No. 48/38, 15-Aswathy Gardens
   Ambalatharakara, Poonthura P.O
   Trivandrum- 695026

[Adv. Basil Mathew, Ninan John, Anu Stephan and Sanjana Sara Varghese Annie for R4 and R6]

The Counsels for both parties and the 3rd Respondent were present in the virtual hearing on 07-06-2023. A Bench consisting of Chairman and two members heard the matter in detail and all the parties raised their contentions and arguments. One of the members had a different view. Finally, the Bench, by majority (2:1) passed final order as follows. The dissenting order is attached separately.

ORDER

1. The case of the Complainant is as follows: The Complainant is the Association of allottees of O2 Zone apartments. The Ist Respondent is a partnership firm, 2nd and 3rd Respondents are its partners. The 4th Respondent is a Private limited construction company, 5th Respondent is its Managing

Director and 6th Respondent is the Chief Executive Officer. The 1st Respondent entered in to a joint venture agreement with the 4th Respondent which owned a property in Kakkanand village for developing the same by constructing a multi storied residential apartment complex by name O2 Zone Apartments. The 1st Respondent obtained building permit dated 13-02-2015 from Trikkakkara Grama Panchayath and thereafter entered into agreement for construction with prospective purchasers of apartment agreeing to construct apartments for them. The members of the Complainant Association are the owners of the apartment. The Respondents failed to comply with their obligations to the allottees. The Complainant sent a Lawyer Notice on 12-05-2018 and the Respondent on 29-06-2018 replied, in which it was stated that the association deposit fee of Rs 28,50,000/- collected from the apartment owners/allottees will be transferred to the Apartment Owners Association account, only after the sale of all apartments. It was also stated that covered car parking will be allotted to the allottees in the next AGM, but the Respondents did not allocate the same. The Respondents have not obtained final fire NOC and had filed a Writ Petition before the Hon'ble High Court of Kerala against fire and Rescue Department for not issuing the final fire NOC. Later, the Complainant association filed impleading petition in the above Writ Petition, due to the lack of interest of the Promoter to get the petition disposed off. The Respondents had failed to obtain

occupancy certificate and door numbers due to which, the apartment owners were unable to sell or get loan from banks. The allottees feel very unsecure to reside in the unauthorized apartment building. The insufficient provision for STP discharge resulting in overflowing of waste due to which the Complainant association is receiving complaints from neighboring residents and from public. There is a shortage of 32 covered carparking slots in the 114 numbers of apartments in the building. The Respondents hold 14 unsold apartments and they failed to pay monthly maintenance charges for the said apartments amounting to Rs. 5,01,125/- The 1st Respondent collected Rs. 25,000/- each from the allottees towards owner's association deposit for forming Apartment Owners Association and total amount so collected is Rs. 25,00,000/- for 100 apartments. The 1st Respondent paid only Rs. 10 lakhs to the Complainant. The remaining amount of Rs. 15,00,000/- is illegally retained by the 1st Respondent. The Respondents ought to have handed over the said amount immediately after the formation of the Association in May 2016. The Promoter had agreed to provide bore well water in the construction agreement, but the bore well water provided by them was not suitable for domestic use, and they refused to provide water treatment facility for borewell water and hence the Complainant Association had to install water treatment facility at a cost of Rs. 4,73,000/-which has to be repaid by the Promoter. The materials and workmanship used for construction

of the building is of inferior quality which caused damages to structure at several locations. The retaining wall leaning towards the road is to be rectified. The reliefs sought by the Complainant are, i) to obtain occupancy certificate and Municipal door number to the apartments and issue the same to the allottees, ii) to provide sufficient sumps, soak pits etc for proper disposal of STP water, iii) to provide covered car parking for all apartments, iv) to pay maintenance charge of Rs. 5,01,125/- with interest for unsold flats, v) Association deposit collected by the Promoter from allottees amounting to Rs. 15,00,000/- with interest, vi) to repay Rs. 4,73,000/- incurred for water treatment plant for borewell, vii) to repair damaged concrete structure, to rectify faulty intercom system, to provide safety railings in the play area, to hand over all approved drawings and documents related to apartment received from Government authorities.

2. The Respondents 1 to 3 in the preliminary objection has denied all the allegations and stated as follows: Partial occupancy certificate was obtained in the year 2015 itself and common areas and amenities were conveyed to the Owners association in 2016 by a duly registered deed, thereby the Respondents have been excluded from the obligation in respect of building and common area. The Complainant has no locus standi to lodge the Complaint which is not maintainable. The Complainant had purchased the apartment in a completed apartment complex as seen from the agreement for sale and the

sale deed executed. There is no shortage of car parking area, the allocation is to be done by lucky draw, it has to be done by the Association. The integrated consent to establish and operate the sewage treatment plant from the Pollution Control Board was secured.

3. Later, the Respondents 1 to 3 filed Counter statement as follows: They secured partial occupancy followed by deemed occupancy under rule 22(3) of the Kerala Municipal Building Rules, 1999 in the year 2015 itself, ie, prior to the Act, 2016. Thereafter the project was registered with the Real Estate Regulatory Authority. Due to handing over of the project and transfer of common area and common amenities to the Owners Association in 2016, by a duly registered deed, no claim could be sustained against the Respondents and are barred by limitation and estoppel and thus the Respondents had excluded from the obligations in respect of building and common area. The issues raised are liable for arbitration as per the arbitration clause in the construction agreement and Respondents requested to refer the matter for arbitration. The obligation to get occupancy is with the individual owners separately and not with the builder who is responsible to complete the structure. According to the Respondents the Real Estate Act, 2016 is a penal legislation and it cannot have retrospective effect, moreover, the Real Estate Regulatory Authority cannot act as a Consumer Forum and there cannot be any adjudication on issues in which deficiency of

service/quality is alleged. There is no provision enabling an Association to lodge a Complaint under the Real Estate Act. The signatory to the Complaint has not been authorized to lodge the Complaint, she is trying to vindicate her personal issues under the umbrella of the Association. Unless the Complaint is accompanied by a resolution to enable signatory to sign the Complaint, it cannot be entertained. From the agreement for sale and the sale deed produced by the complainant, it could be seen that the Complainant purchased her apartment in a completed apartment complex and it cannot be said that the construction was not completed and an on-going project. The construction was started during 2007 and the area was under the Panchayath where KMBR was not applicable, later the area was converted as Municipality and as per the outcome of decision of Hon'ble High Court of Kerala, similarly placed projects in the verge of completion were allowed to be sanctioned with building permit etc., consequently building permit dated 13-02-2015 was secured and on the same day partial occupancy certificate was also given. With respect to the rest of the building, the plan with certificate of completion was sent to Fire and Rescue office for their clearance. The averment that the allottees paid sale price of apartment to the 1st Respondent is false. The averment that the deposit collected from the allottees was not handed over to the Association is also not correct. The actual part from sold apartments has been handed over and there remains some issues

regarding settlement of accounts. The averment that the required parking was not allocated is not correct. It is not correct to state that the occupancy certificate was not secured. The occupancy was issued in part on 13-02-2015, the required fee was paid on 28-06-2015 and there was no communication of refusal of occupancy certificate within 15 days, therefore from 10-09-2015, as per provisions of Rule 22(3) of KMBR, 1999 the deemed occupancy came in to force. Hence the project is not an on going project and there is no reason to allege that there was no occupancy certificate. After occupying the building with all amenities and facilities, the Complainant cannot say that it feels insecurity due to unauthorized occupation. The builder is entitled to adjust the expenses borne by him in respect of the repairing works and actually there was no dues to the Owners Association and there is no contract for payment of interest and in case of any claim in this regard it has to be made in the form of a civil litigation. The builder had to over spend for maintaining the common area till the apartment owners Association had taken over the maintenance. Therefore, the builder is entitled to adjust the cost thereof from the amount which was with the builder. Even then the builder is ready to pay the agreed amount to keep the gentleman's word. The builder is not bound to bear the cost of water treatment plant. It was made at the option of the Complainant association, that the cost thereof was borne by the Association for its own benefit and comfort. The building was

completed in high standard quality. It appears that the damage occurred to the basement due to some acts after handing over the premises. The allegation that it was of inferior quality is not correct. The collapse of retaining wall was due to natural calamity of over flow of storm water, however it was rectified at the cost of the builder. The concept of on-going projects cannot be implemented by applying the method of treating an apartment complex without occupancy certificate as an on-going project. The Real Estate Act provides for penalty and punishment and the same is a penal legislation which cannot have any ex post facto application.

4. The Respondents 4 and 6 also filed objection stating that the said Respondents are not necessary parties and not promoters as defined under the Real Estate (Regulation and Development) Act, 2016. The 4th Respondent was the absolute owner of the property and a joint venture agreement dated 07-02-2007 between the 1st Respondent and the 4th Respondent was executed for developing the property by constructing the apartment. It was agreed to complete construction and to allot 27% of the constructed area in the apartment complex consisting of 31 completed apartments with one car park each to the Respondent No. 4 towards value of land. The agreement was executed by Respondent No. 4 as the owner of land and Respondent No. 1 as the Promoter. It was also agreed to execute sale deed regarding 73% undivided share in the land in favour of

the promoters or its purchasers. Respondent No. 4 has executed sale deed as requested by the Promoters. Apart from the execution of the sale deed there is no duty, responsibility, liability or obligation on the part of the 4th Respondent. The Respondents No. 4 to 6 have not collected association deposit fee or any other amount from the complainant and hence not liable to pay Rs. 28,50,000/- The statement that fire NOC not obtained is not fully correct. On filing Writ Petition before the Hon'ble high Court of Kerala, the Authorities got convinced and are about to issue final fire NOC. After completion of construction, sale deed was registered in favour of the owners and also possession of the apartment was handed over to the respective owners. The materials used are good quality and there is no damage as alleged. The Respondents have produced copy of joint venture agreement dated 07-02-2007.

5. The Authority on 20-10-2020, noticed that though the project in question had not obtained occupancy certificate, Respondent/Promoter have not registered the project under Section 3 of the Real Estate (Regulation and Development) Act, 2016 [herein after referred to as the Act, 2016] before the Authority. Hence vide order dated 20-10-2020, the Authority directed the Respondents 1 to 3 to register the project within two weeks along with penalty determined by the Authority, against which the Respondents filed appeal before the Hon'ble Real Estate Appellate Tribunal, Ernakulam. The said appeal was later

dismissed as not pressed, vide order dated 19-01-2022 in REFA No 50 of 2021. Thereafter, the project has been registered vide certificate No K-RERA/PRJ/ERN/032/2022 and the registration expired on 23-07-2021.

6. Vide interim order dated 01-06-2022 the Respondents were directed to make arrangements to obtain door numbers to individual units and to provide all documents including occupancy certificate under section 19(5) to the complainant Association within two months. In the hearing during 04-02-2023 the Counsel for the Complainant submitted that in spite of direction given by the Authority, the door numbers were not provided so far by the respondents and the irregularities noticed in the car parking have not yet been rectified by the Respondents. It was further submitted that due to the improper functioning of STP, waste water was flowing out of it and it was making huge difficulties to the allottees. The Authority directed Respondents No 1 to 3 to take steps to obtain door numbers to all the allottees/units within 15 days and provide proper car parking spaces to all the allottees as agreed as per agreements executed with them, based on the approved plan. The Respondents were also directed to update the web page as provided under the Act and Rules.

7. The parties were finally heard on 07-06-2023 and after careful consideration of the submission made by the learned Counsels, verification of documents produced, the Authority

came to the conclusion that the only issues that are to be decided is the repayment of amount collected as corpus fund from the allottees by the promoters and those reported by the two officers of the Authority who inspected the project site on 29-03-2023 as directed.

8. The above report submitted by the two officers of the Authority is marked as **Exhibit X1**. It is stated in the report that i) the Respondents had agreed to hand over all documents including occupancy certificate to the Complainant upon execution of a legal agreement for transfer of all documents and ii) regarding the transfer of corpus fund collected from the allottees, the promoter had agreed to transfer the same, iii) the Complainant Association had claimed arrears of maintenance charges to be paid by the Promoter but the promoter wanted this to be waived off. The documents produced by the Complainant Association is marked as **Exhibits A1- A13** and the documents produced by the Respondents were marked as **Exhibit B1- to B17. Exhibit A7** is the Lawyer Notice dated 12-05-2018 issued on behalf of the Complainant Association to the 1st Respondents. In the Lawyer notice it is stated that Rs 25,000/- was recovered from each allottee under the head Association formation charges and this comes to Rs 28,50,000/-. It was further stated that only an amount of Rs 10,00,000/- was handed over to the Complainant Association and the balance amount outstanding is Rs.18,50,000/- **Exhibit A8** is the reply notice issued by the

Counsel for the 1st Respondent represented by the 2nd Respondent. In the reply notice it is confirmed that Rs.28,50,000/- is to be received from all the owners at the time of registration of the flats and this will be transferred to the Complainant Association only when all the apartments are sold. In the preliminary objection filed by the Respondents 1 to 3 it is stated that there are 114 apartments and 100 apartments were sold to several persons and there remains 14 apartments unsold. Now that the association has taken over the maintenance of the apartment building and premises, it is the duty of the Respondents to transfer this amount of Rs 28,50,000/- The Complainant Association is seeking refund of deposit collected by the Respondents from the allottees, amounting to Rs. 15,00.000/- along with 18% interest from the date of formation of Association. According to the Complainant, Rs 25,000/- was collected from each apartment owner as association deposit. **Exhibit A1** is the construction agreement dated 2-05-2017 executed between Ardra Kurian, the President of the Complainant Association and the 1st Respondent Represented by its partners 2nd and 3rd Respondents. It is stated in the above agreement that the cost of construction and undivided share of land for the Residential apartment shall be Rs. 59 lakhs which is inclusive of Association deposits. The Respondents/Promoters had uploaded the occupancy certificate dated 10-08-2021 and Form 6 in the website of the Authority.

9. As far as the transfer of corpus fund is concerned, the Promoter had already agreed to transfer this amount to the Complainant Association. As far as the interest portion is concerned, the Act, 2016 does not permit collection of any deposit by the promoter under the prescribed agreement for sale and therefore the interest on such amount collected cannot be ordered by the Authority. Another relief sought by the complainant Association was to pay maintenance charge of Rs. 5,01,125/- with interest for unsold flats. Under section 37 of the Act the Authority for the purpose of discharging its functions under the provisions of this Act or Rules or Regulations made thereunder can issue directions to the promoters allottees. Under section 11(d) the promoter is responsible for providing and maintaining the essential services on reasonable charges, till the taking over the maintenance of the project by the association of allottees. Here the association has already taken over the maintenance of the project, and the maintenance charges are collected by the Association from the allottees. Under Section 19(6) every allottee who has entered into an agreement for sale to take an apartment 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 maintenance charges etc. It is evident that under Section 31 of the Act, 2016, any person can file a complaint only against a promoter, allottee or real estate agent.

An allottee association when aggrieved, is entitled to file a Complaint with this Authority against the promoter or an allottee or a real estate agent by virtue of the explanation to sub section (1) of Section 31 of the Real Estate (Regulation & Development) Act, 2016, since, person would include an association of allottees. The Association is registered under the Travancore Cochin Literary, Scientific and Charitable Societies Act Registration Act, 1955, and the dispute between allottees, Association of Allottees and Allottees, on maintenance charges do not fall within the jurisdiction of this Authority and claim for maintenance charges cannot be entertained by this Authority.

10. In the light of the above facts and circumstances of the case, the authority by invoking Section 37 of the Act 2016, hereby directs as follows:

i) The Respondents No. 1-3/Promoters shall pay a sum of Rs 15,00,000/- (Rupees Fifteen Lakhs only) within 15 days of receipt of this order. The Respondents/Promoters shall also remit the Complainant Association, such amounts received towards Association deposit from the buyers of the unsold units as and when the sale of each unit takes place.

ii) The Respondents/Promoters shall formally hand over all the documents pertaining to the project in question including title deeds, documents and plans including common areas, necessary drawings, sanctions and

approvals, etc. obtained for the project to the Complainant Association within 15 days from the date of receipt of this order.

ii) With regard to other issues as to defective construction etc, the Complainant is at liberty to file compensation claim before the Adjudicating Officer.

Sd/-	Sd/-
M.P. Mathews	P H Kurian
Member	Chairman

Preetha P. Menon, Member (Dissenting):

ORDER

1. The case of the Complainant is as follows: The Complainant is the Association of allottees of O2 Zone apartments. The 1st Respondent is a partnership firm, 2nd and 3rd Respondents are its partners. The 4th Respondent is a Private limited construction company, 5th Respondent is its Managing Director and 6th Respondent is the Chief Executive Officer. The 1st Respondent entered in to a joint venture agreement with the 4th Respondent which owned a property in Kakkanad village for developing the same by constructing a multi storied residential apartment complex by name 'O2 Zone Apartments'. The 1st Respondent obtained

building permit dated 13-02-2015 from Trikkakkara Grama Panchayath and thereafter entered into agreement for construction with prospective purchasers of apartment agreeing to construct apartments for them. The members of the Complainant Association are the owners of the apartments and the Respondents failed to comply with their obligations to the allottees. The Complainant sent a Lawyer Notice on 12-05-2018 and the Respondent on 29-06-2018 replied, in which it was stated that the association deposit fee of Rs 28,50,000/- collected from the apartment owners/allottees will be transferred to the Apartment Owners Association account, only after the sale of all apartments. It was also stated that covered car parking will be allotted to the allottees in the next AGM. But the Respondents did not allocate the same. The Respondents have not obtained final fire NOC and had filed a Writ Petition before the Hon'ble High Court of Kerala against fire and Rescue Department for not issuing the final fire NOC. Later, the Complainant association filed impleading petition in the above writ petition, due to the lack of interest of the Promoter to get the petition disposed of. The Respondents had failed to obtain occupancy certificate and door numbers due to which, the apartment owners were unable to sell or get loan from banks. The allottees feel very unsecure to reside in the unauthorized apartment building. The insufficient provision for STP discharge resulting in overflowing of waste due to which the Complainant association is receiving complaints from neighboring residents and from public.

There is a shortage of 32 covered carparking slots in the 114 numbers of apartments in the building. The Respondents hold 14 unsold apartments and they failed to pay monthly maintenance charges for the said apartments amounting to Rs. 5,01,125/-. The 1st Respondent collected Rs. 25,000/- each from the allottees towards owner's association deposit for forming Apartment Owners Association and the total amount so collected is Rs. 25,00,000/- for 100 apartments. The 1st Respondent paid only Rs. 10 lakhs to the Complainant. The remaining amount of Rs. 15,00,000/- is illegally retained by the 1st Respondent. The Respondents ought to have handed over the said amount immediately after the formation of the Association in May 2016. The Promoter had agreed to provide bore well water in the construction agreement, but the bore well water provided by them was not suitable for domestic use, and they refused to provide water treatment facility for borewell water and hence the Complainant Association had to install water treatment facility at a cost of Rs. 4,73,000/-which has to be repaid by the Promoter. The materials and workmanship used for construction of the building is of inferior quality which caused damages to structure at several locations. The retaining wall leaning towards the road is to be rectified. The reliefs sought by the Complainant are, i) to obtain occupancy certificate and municipal door number to the apartment and issue the same to the allottees, ii) to provide sufficient sumps, soak pits etc. for proper disposal of STP water, iii) to provide

covered car parking for all apartments, iv) to pay maintenance charge of Rs. 5,01,125/- with interest for unsold flats, v) Association deposit collected by the Promoter from allottees amounting to Rs. 15,00,000/- with interest, vi) to repay Rs. 4,73,000/- incurred for water treatment plant for borewell, vii) to repair damaged concrete structure, to rectify faulty intercom system, to provide safety railings in the play area, to hand over all approved drawings and documents related to apartment received from Government authorities.

2. The Respondents 1 to 3 in the preliminary objection has denied all the allegations and stated as follows: The Partial occupancy certificate was obtained in the year 2015 itself and common areas and amenities were conveyed to the Owners association in 2016 by a duly registered deed, thereby the Respondents have been excluded from the obligation in respect of building and common area. The Complainant has no locus standi to lodge the Complaint which is not maintainable. The Complainant had purchased the apartment in a completed apartment complex as seen from the agreement for sale and the sale deed executed. There is no shortage of car parking area, the allocation is to be done by lucky draw, it has to be done by the Association. The integrated consent to establish and operate the sewage treatment plant from the Pollution Control Board was secured. The Respondents had produced copy of building permit, copy of partial occupancy certificate, copy of Judgement of

Hon'ble High Court in WP (C) No 3811/2018 and WP(C) No.12990/2018, copy of letter dated 29-10-2015 of Municipal Engineer, copy of letter dated 31-03-2018 of Divisional Officer Fire and Rescue Ernakulam, copy of initial certificate dated 11-05-2007 of Fire and Rescue, Thiruvananthapuram, copy of letter to the Municipal Secretary dated 4-12-2017 by the Respondents, copy of letter dated 07-02-2018 of Fire and Rescue, Ernakulam, copy of letter dated 14-02-2018 of Municipality to Fire and Rescue, Ernakulam, copy of impleading petition in WP(C) No 12990/2018, copy of sale deed dated 05-05-2017 executed with the Owners Association, copy of letter dated 20-10-2016 of the Owners Association, copy of letter dated 19-07-2014 of the Deputy Chief Electrical Inspector, copy of letter dated 22-08-2016 of Owners Association, copy of Commissioning report dated 2-05-2017 of LPG pipeline Installation, and copy of consent to operate-renewal from pollution Control Board dated 15-07-2019.

3. Later, the Respondents No. 1-3 filed Counter Statement as follows: They secured partial occupancy followed by deemed occupancy under rule 22(3) of the Kerala Municipal Building Rules, 1999 in the year 2015 itself, prior to the Act, 2016. Thereafter the project was registered with the Real Estate Regulatory Authority. Due to handing over of the project and transfer of common area and common amenities to the Owners Association in 2016, by a duly registered deed, no claim could be sustained against the Respondents and are barred by limitation and

estoppel and thus the Respondents had been excluded from the obligations in respect of building and common area. The issues raised are liable for arbitration as per the arbitration clause in the construction agreement and Respondents requested to refer the matter for arbitration. The obligation to get occupancy is with the individual owners separately and not with the builder who is responsible to complete the structure. According to the respondent the Real Estate Act, 2016 is a penal legislation and it cannot have retrospective effect, moreover, the Real Estate Regulatory Authority cannot act as a Consumer Forum and there cannot be any adjudication on issues in which deficiency of service/quality is alleged. There is no provision enabling an Association to lodge a Complaint under the Real Estate Act. The signatory to the Complaint has not been authorized to lodge the Complaint, she is trying to vindicate her personal issues under the umbrella of the Association. Unless the Complaint is accompanied by a resolution to enable signatory to sign the Complaint, it cannot be entertained. From the agreement for sale and registered sale deed produced by the Complainant, it could be seen that the Complainant purchased her apartment in a completed apartment complex and it cannot be said that the construction was not completed and the project is an on-going project. The construction was started during 2007 and the area was under the Panchayath where KMBR was not applicable, later the area was converted as Municipality and as per the outcome of decision of Hon'ble High Court of Kerala, similarly

placed projects in the verge of completion were allowed to be sanctioned with building permit etc., consequently building permit dated 13-02-2015 was secured and on the same day partial occupancy certificate was also given. With respect to the rest of the building, the plan with certificate of completion was sent to Fire and Rescue office for their clearance. The averment that the allottees paid sale price of apartment to the 1st Respondent is false. The averment that the deposit collected from the allottees was not handed over to the Association is also not correct. The actual part from sold apartments has been handed over and there remains some issues regarding settlement of accounts. The averment that the required parking was not allocated is not correct. It is not correct to state that the occupancy certificate was not secured. The occupancy was issued in part on 13-02-2015, the required fee was paid on 28-06-2015 and there was no communication of refusal of occupancy certificate within 15 days, therefore from 10-09-2015, as per provisions of Rule 22(3) of KMBR, 1999 the deemed occupancy came in to force. Hence the project is not an ongoing project and there is no reason to allege that there was no occupancy certificate. After occupying the building with all amenities and facilities, the Complainant cannot say that it feels insecurity due to unauthorized occupation. The builder is entitled to adjust the expenses borne by him in respect of the repairing works and actually there are no dues to the Owners Association and there is no contract for payment of interest and in case of any claim in this

regard it has to be made in the form of a civil litigation. The builder had to overspend for maintaining the common area till the apartment owners Association had taken over the maintenance. Therefore, the builder is entitled to adjust the cost thereof from the amount which was with the builder. Even then the builder is ready to pay the agreed amount to keep the gentleman's word. The builder is not bound to bear the cost of water treatment plant. It was made at the option of the Complainant association the cost thereof was borne by the Association for its own benefit and comfort. The building was completed in high standard quality. It appears that the damage occurred to the basement due to some acts after handing over the premises. The allegation that it was of inferior quality is not correct. The collapse of retaining wall was due to natural calamity of over flow of storm water, however it was rectified at the cost of the builder. The concept of on-going projects cannot be implemented by applying the method of treating an apartment complex without occupancy certificate as an on-going project. The Real Estate Act provides for penalty and punishment and the same is a penal legislation which cannot have any ex post facto application.

4. The Respondents No. 4 and 6 also filed objection stating that the said Respondents are not necessary parties and they are not promoters as defined under the Real Estate (Regulation and Development) Act, 2016. The 4th Respondent was the absolute owner of the property and a joint venture agreement dated 07-02-

2007 between the 1st Respondent and the 4th Respondent was executed for developing the property by constructing the apartment. It was agreed to complete the construction and to allot 27% of the constructed area in the apartment complex consisting of 31 completed apartments with one car park each to Respondent No. 4 towards value of land. The agreement was executed by Respondent No. 4 as the owner of the land and Respondent No. 1 as the Promoter. It was also agreed to execute sale deed regarding 73% undivided share in the land in favour of the promoters or its purchasers. The Respondent No. 4 has executed sale deeds as requested by the Promoters. Apart from the execution of the sale deeds there is no duty, responsibility, liability or obligation on the part of the 4th Respondent. The Respondents No. 4 to 6 have not collected association deposit fee or any other amount from the complainant and hence not liable to pay Rs. 28,50,000/- The statement that fire NOC is not obtained is not fully correct and on filing Writ Petition before the Hon'ble High Court of Kerala, the Authorities got convinced and are about to issue final fire NOC. After completion of construction, sale deeds were executed in favour of the owners and also possession of the apartment was handed over to the respective owners. The materials used are of good quality and there is no damage as alleged. The Respondents have produced copy of joint venture agreement dated 07-02-2007.

5. The Authority, on 20-10-2020, noticed that though the project in question has not so far obtained the occupancy

certificate, the Respondent/Promoters have not registered the project under Section 3 of the Real Estate (Regulation and Development) Act, 2016 [herein after referred to as the Act, 2016] before the Authority. Hence, vide order dated 20-10-2020, the Authority directed the Respondents 1 to 3 to register the project within two weeks along with penalty determined by the Authority, against which the Respondents filed appeal before the Hon'ble Real Estate Appellate Tribunal, Ernakulam. The said appeal was later dismissed as not pressed, vide order dated 19-01-2022 in REFA No 50 of 2021. Thereafter, the project has been registered vide No. K-RERA/PRJ/ERN/032/2022 and the registration expired on 23-07-2021.

6. We directed the Respondents/Promoters, vide interim order dated 01-06-2022, to make arrangements to obtain door numbers to individual units and to provide all the documents including occupancy certificate under section 19(5) to the complainant Association within two months. In the hearing on 04-02-2023, the learned Counsel for the Complainant submitted that in spite of direction given by the Authority, the door numbers have not been procured so far by the Respondents/Promoters and the irregularities noticed in the car parking have not yet been rectified by the Respondents. It was further submitted that due to improper functioning of STP, waste water was flowing out and it was making huge difficulties to the allottees. After hearing on that day, the Authority directed the Respondents No. 1 to 3 to take steps

to obtain door numbers to all the allottees/units within 15 days and provide proper car parking spaces to all the allottees as agreed as per agreements executed with them, based on the approved plan and the Respondents were also directed to update the registration web page, as provided under the Act and Rules.

7. This Authority deputed two of the officers of the Authority to inspect the project site and submit a report in respect of the issues on dispute pursuant to which inspection was conducted on 29-03-2023 and submitted a report in which it is stated that i) certain parking spaces are provided over the sump and in front of the STP where several manholes are seen, ii) access to two-wheelers parking spaces is obstructed by the car parking space provided in front, iii) the parking space provided in front of the electrical room obstructs access to the electrical room, iv) the treated waste water from the STP used for watering the garden and excess water from the area runs off and accumulated in the rear side of the apartment, drive way and parking area, v) small cracks were found in the basement roof slabs and have already been plastered, vi) there is no fencing/protection wall provided at the rear side of the parking slot.

8. During the hearing on 05-04-2023, it is submitted by the learned Counsels that Occupancy Certificate has been obtained for the project and door numbers have been issued to the apartments in compliance of the earlier directions of this Authority. But the learned Counsel appearing for the Complainant alleged that

documents as prayed have not been handed over by the Respondent promoter. Anyhow, the learned Counsel appearing for the Respondents No. 1-3 undertaken that the documents shall be handed over immediately and the common area has already been transferred. According to the learned Counsel for the Complainant, the corpus fund is to be transferred to the Association and as per the construction agreement the total amount of consideration is inclusive of Association deposit.

9. The Project in question is registered before this Authority under Section 3 of the Act 2016. With respect to the allegation of the Complainant regarding shortage of Car parking spaces and the connected prayer, it is seen uploaded by the Respondents/Promoters in the registration web page of the project that the number of covered car parking is 100 and number of open car parking is 20 in the said project. Admittedly number of sold units is 100 in this project. Regarding the prayer related to shortage of sumps, soak pits etc. for proper disposal of STP water, the Exhibit. X1 inspection report states that "*the treated waste water from the STP used for watering the garden and excess water from the area runs off and accumulated in the rear side of the apartment, drive way and parking area*" which corroborates the allegations raised by the Complainants. However, the project has obtained the 'Integrated Consent to Operate' from Kerala State Pollution Control Board copy of which is also seen uploaded in the registration web page and also produced by the Respondents 1-3 and marked as Exbt.

B16. So, the above said issues are to be redressed by the Pollution Control Board as well as the local authority concerned and the Complainants can approach these authorities for redressal of said grievances. Other prayers of the Complainant with regard to the damages ensued after taking over possession of the property, due to defective construction or non-provision of any of the promised amenities etc., the law prescribes compensation as per Section 14(3) of the Act 2016, which could be availed within 5 years from the date of taking over possession for which the members of the Complainant Association could file separate complaints in Form N and those complaints shall be adjudicated by the Adjudicating Officer of this Authority, as provided under Section 71 of the Act 2016 read with Rule 37 of the Kerala Real Estate (Regulation & Development) Rules 2018. According to Section 14(3) of the Act 2016, *"In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act".*

10. The parties were finally heard on 07-06-2023 and after careful consideration of the submission made by the learned Counsels, verification of documents produced, it is found that the

issues which remain to be decided are i) the transfer of amount collected as Association deposit from the allottees by the promoters, ii) the maintenance charge of 14 unsold apartment held by the Respondents/Promoters iii) the handing over of documents to the association. The documents produced by the Complainant Association are marked as Exhibits A1- A13 and the documents produced by the Respondents are marked as Exhibit B1- to B17. The preliminary contention raised by the Respondents No.1-3 that they had secured partial occupancy followed by deemed occupancy under rule 22(3) of the Kerala Municipal Building Rules, 1999 in the year 2015 itself, prior to the Act, 2016 is not legally sustainable as Section 3 of the Real Estate (Regulation & Development) Act 2016 mentions only about the 'Completion Certificate' which in the case of State of Kerala, is the 'Occupancy Certificate' issued by the Competent Authority and it is confirmed by the Government through the Kerala Real Estate (Regulation & Development) Rules 2018. So, the 'partial occupancy certificate' or the 'deemed occupancy certificate' has no relevance in this regard and it has been settled clearly by the Hon'ble High Court of Kerala and the Hon'ble Apex Court through several judgements. Moreover, it is clear from the counter statement that the Respondents/Promoters have not obtained Fire clearance at the time of applying for the Occupancy Certificate and hence the reason for not obtaining the final occupancy certificate could easily be ascertained. However, the Respondents/Promoter got convinced of these facts after the

initial hearings before us and consequently got the project registered before this Authority as per Section 3 of the Act 2016. Hence no issue of maintainability of the complaint subsists and no scope is there for a detailed discussion over the contentions raised by the Respondents/Promoters in this regard through their pleadings. Anyhow, it is surprising to go through the strange contentions raised from the part of Respondents No. 1-3 in their counter statement that "the obligation to get occupancy certificate is with the individual owners separately and not with the builder who is responsible to complete the structure, the Real Estate Act, 2016 is a penal legislation and it cannot have retrospective effect, moreover, the Real Estate Regulatory Authority cannot act as a Consumer Forum and there cannot be any adjudication on issues in which deficiency of service/quality is alleged, and there is no provision enabling an Association to lodge a Complaint under the Real Estate Act", etc. which are worthless and made without perusing the provisions of the Act 2016. Section 11(4)(b) of the Act 2016 stipulates that "*the Promoter shall be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;* "The retroactive character of the Act 2016 is also well settled through many judgements including that of Hon'ble Bombay High Court in *Neelkamal Realtors Suburban Pvt. ... vs The Union Of India And Ors.* which

was confirmed later by the Hon'ble Supreme Court of India in *M/S Newtech Promoters and others vs State Of Uttar Pradesh* in which it was held as follows: "*From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.*" Hence the argument of the Respondents/Promoters that "the Act 2016 provides for penalty and punishment which is a penal legislation and it cannot have any ex post facto application" is also totally insignificant. Another contention that this Authority has no jurisdiction to adjudicate quality aspects, etc. is also totally against the provisions of the Act because Section 14(3) guarantees protection in this regard to the allottees within 5 years of handing over possession to them by the promoters, which provision has been reproduced in the pre para. Again, with respect to the argument as to the competency of the Association of allottees to file complaints, Explanation of Section 31 of the Act 2016 specifies that "*for the purpose of this section, "person" shall include the Association of allottees or any voluntary association registered under any law for the time being in force.*"

11. After hearing of parties and perusal of documents concerned it has been found that the Respondents 4-6 are land owners whose responsibility was only execution of sale deeds in favour of the allottees and they have not received any amount as association

deposit. The learned counsel for the Respondents 4-6 argued that they do not fall under the definition of the Promoters and the obligation cast upon them as per the joint development agreement to execute the sale deeds has already been complied with by them which is never seen objected by the learned counsel for Respondents No. 1-3. The inspection report by the officers of the Authority is marked as Exhibit X1. Exhibit A7 is the Lawyer Notice dated 12-05-2018 issued on behalf of the Complainant Association to the 1st Respondent in which, it is stated that Rs. 25,000/- was recovered from each allottee under the head Association formation charges which comes to Rs 28,50,000/-in total and only an amount of Rs 10,00,000/- was handed over to the Complainant Association and the balance amount outstanding is Rs18,50,000/- Exhibit A8 is the reply notice issued by the Counsel for the 1st Respondent represented by the 2nd Respondent in which it is stated that Rs.28,50,000/- will be refunded only after selling all the apartments and some flats are yet to be sold in the project. It is further stated that whenever all the apartments are sold the entire amount received will be entrusted to the Association. According to the Respondents 1 to 3, out of 114 apartments 100 apartments were sold and 14 apartments remain unsold. The Complainant Association is seeking return of deposit collected by the Respondents from the allottees, amounting to Rs. 15,00,000/- along with 18% interest from the date of formation of Association as Rs. 10,00,000/- has already been received out of Rs.25,00,000/- collected from 100 allottees.

According to the Complainant, Rs. 25,000/- was collected by the Respondents/Promoters from each apartment owner towards association deposit. Exhibit A1 construction agreement states that the amount of consideration is inclusive of Association deposit received from the allottee. It is to be noted that the Respondents/Promoters have no dispute with respect to the payment received from the allottees towards Association deposit. However, they cannot raise contention that the deposit will be returned only after sale of all the units in the project because the existing allottees are not supposed to wait endlessly for getting the deposited amount till the sale of last unit takes place in the project. As the Complainant Association has taken over possession and maintenance of the apartment building and premises, the Respondents/promoters ought to have transferred the amount of Rs. 25,00,000/- collected for 100 sold apartments at the time of handing over the project to the Association. But it is found that the Respondents/Promoters have paid only Rs. 10,00,000/- out of the total amount to the Complainant Association. In view of the above facts, it is found that the Respondents No. 1-3 are liable to return the balance amount to the Complainant Association and also to remit such payments received under the same head from the prospective allottees of unsold apartments, as and when the sale takes place. Accepting the contention of the Respondents/Promoters that they had to overspent for common area maintenance till handing over the possession to the Complainant

Association and on the basis of their right as prescribed under Section 11(4)(g) of the Act 2016, no interest is being ordered on the amount due as claimed by the Complainant.

12. With regard to the claim of maintenance charges of unsold apartments, undoubtedly it is the responsibility of the Respondents/Promoters to pay maintenance charges with respect to the unsold units as they are the owners of unsold units until and unless these units are sold to some other persons and the promoters shall also be a member of the Association of allottees until the sale of the last unit in the project takes place. Needless to mention that the allottees of each and every unit of the project shall be members of the Association and the membership is mandatory not optional. Even if a unit is not occupied, the owner/allottee of the said unit is duty bound to pay monthly maintenance charge. Otherwise, the inhabitants in the project shall be overburdened and thereby the upkeep of common areas and the whole property will be badly affected. The legislations concerned are seen giving due importance for formation of Association of allottees purpose of which is proper maintenance and upkeep of the common areas and the project property as a whole. Section 19(6) of the Act 2016 provides one of the duties of Allottees as follows: *"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." Similarly, with respect to formation of Association, Section 11(4)(e) of the Act 2016 lays down that "*the Promoter shall enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable: Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;"* The Kerala Apartment Ownership Act 1983 consists of provisions related to the obligations of apartment owners in payment towards maintenance of common areas of such apartment projects. In this context, we would mention Clause 20 of Annexure A Format agreement prescribed under Rule 10 of the Kerala Real Estate (Regulation and Development) Rules, 2018 which is as follows: "*the promoter has assured the Allottees that the project in its entirety is in accordance with the provisions of the Kerala Apartment Ownership Act, 1983(5 of 1984)*" When we refer Section 17 of the Kerala Apartment Ownership Act, it stipulates that "*No apartment owner shall be entitled to exempt himself from liability for his contribution towards the common expenses, by waiver of the use or enjoyment of any of the common areas and facilities, or by abandonment of his apartment*". According to Section 19 of the said Act, "*All sums assessed by the Association of Apartment Owners but unpaid for the share of common expenses chargeable to any apartment shall constitute a charge on such apartment and shall have the priority over all other charges, except only- i) charge, if any, on the apartment for payment of taxes due to the Government or a local authority; and ii) all sums paid on a first mortgage*

of the apartment." As per provisions of Section 6 of the said Act, "*each apartment owner is entitled to an undivided interest in the common areas and facilities and such value is to be calculated by taking as basis the value of the apartment in relation to the value of property and shall reflect the limited common areas and facilities*." From these provisions, the inevitability and importance given by the laws concerned, for such payments to be made by owners of each apartment, could very well be established. As far as the unsold apartments in a project are concerned, the Promoter is the owner and he would also be a member in the Owners Association and he is liable to pay the monthly maintenance charges with respect to the unsold portion to the Association. Here, in this case, the agreement for construction specifies that the purchaser shall pay his share of the monthly charges for the routine upkeep and maintenance of the common areas and operation of common facilities/amenities. Hence, being the owner of the unsold portion, the promoter is liable to pay the charges for up keep and maintenances of common area towards the share allocated to the unsold units. However, the memorandum of association marked as Exhibit A9 states that the monthly association charge is as determined by the General body from time to time to be collected from the members. But the minutes of general body produced by the Complainant as Exhibits A10 is silent about the rate of maintenance charges to be paid by each allottee. Though there is obligation on the part of the Respondent/Promoter to pay for the share of the monthly charges

for the routine upkeep and maintenance of the common areas with respect to the unsold units, the rate of such charge is not seen specified anywhere in the agreement, bye-laws, or in the Complaint. Hence, the Respondents No. 1-3 herein are found liable to remit the amount due in this regard to the Association of allottees in accordance with the details of accounts and documents concerned, kept by the Association in this regard.

13. As far as the prayer as to handing over of documents is concerned, as per Sections 17(2) and 19(5) of the Act, 2016 it is mandatory that the Promoter shall hand over necessary documents and plans including common areas to the association of the allottees within thirty days after obtaining Occupancy certificate. It is found that the Respondents/Promoters herein have uploaded in the website of the Authority, the occupancy certificate dated 10-08-2021 obtained by them as well as Form 6 declaring that the project has been completed in all respects. Hence, the Respondents No. 1-3 are bound to hand over all the documents including plans, permits and sanctions, drawings, etc with respect to the project to the association of the allottees immediately.

14. In the light of the above facts and findings and with the powers conferred by Section 37 of the Act 2016, the Respondents No. 1-3 are hereby directed as follows:

i) The Respondents No. 1-3/Promoters shall pay a sum of Rs 15,00,000/- (Rupees Fifteen Lakhs only) within 15 days of

receipt of this order. The Respondents/Promoters shall also remit the Complainant Association, such amounts received towards Association deposit from the buyers of the unsold units as and when the sale of each unit takes place.

ii) The Respondents/Promoters shall also pay the amount due towards the monthly maintenance charges applicable to the unsold units within 15 days from the date of receipt of this order, for which the Complainant Association shall furnish to the Respondents/Promoters the details of accounts/documents kept by them in this regard.

iii) The Respondents/Promoters shall formally hand over all the documents pertaining to the project in question including title deeds, documents and plans including common areas, necessary drawings, sanctions and approvals, etc. obtained for the project to the Complainant Association within 15 days from the date of receipt of this order.

Sd/-
Preetha P. Menon,
Member.

True Copy/Forwarded By/Order/

Secretary (Legal)

APPENDIX

Exhibits marked on the side of the Complainant

Exhibit A1- Copy of Agreement for sale dated 02-05-2017

Exhibit A2- Copy of Agreement for construction dated 02-05-2017.

Exhibit A3- Copy of Registered sale deed dated 02-06-2017.

Exhibit A4- Copy of brochure of O2 Ozone.

Exhibit A5- Copy of Registration Certificate of the Owners Association.

Exhibit A6 Series - Copies of communication with the Builder dated 18-07-2017, 22-09-2017, 01-04-2018, 21-01-2020, 26-08-2018, 28-08-2018, 29-11-2017, 13-07-2018.

Exhibit A7- Copy of Lawyers notice dated 12-05-2018 to the Respondent

Exhibit A8- Copy of reply to the lawyer notice dated 29-06-2018 by the Respondent

Exhibit A9- Copy of memorandum of association of the Complainant Association.

Exhibit A10- Copy of minutes of 4th Annual General body meeting.

Exhibit A11- Copy of borewell water test analysis report.

Exhibit A12 Series- Copies of bills dated 31-08-2016 and 28-05-2018 paid for water treatment plant.

Exhibit A13 Series- Copy of photographs of the project.

Exhibits marked on the side of the Respondents 1-3

Exhibit B1- Copy of building permit dated 13-02-2015 issued by Trikkakkara Muncipality

Exhibit B2- Copy of occupancy certificate (partial occupancy) dated 13-02-2015 issued by Trikkakkara Muncipality

Exhibit B3-Copy of letter dated 29-10-2015 from Municipal Engineer Trikkakkara Municipality to the Station officer Fire and Rescue Thrikkakkara.

Exhibit B4-Copy of judgement in WP(C) 3811/2018 dated 27-03-2018.

Exhibit B5- Copy of letter dated 31-03-2018 of Divisional Officer, Fire and Rescue, Ernakulam.

Exhibit B6- Copy of initial certificate dated 11-05-2007 from Fire and Rescue Service Headquarters.

Exhibit B7-Copy of letter from 4th Respondent to the Municipality dated 04-12-2017.

Exhibit B8-Copy of letter dated 07-02-2018 of Divisional Officer, Fire and Rescue, Ernakulam.

Exhibit B9 -Copy of letter dated 14-02-2018 of the Municipality to Divisional Officer, Fire and Rescue, Ernakulam.

Exhibit B10- Copy of impleading petition by the Complainant association in WP(C) 12990/2018 before the Hon'ble High Court of Kerala.

Exhibit B11- Copy of sale deed dated 05-05-2007 between 1st and 4th Respondents.

Exhibit B12 -Copy of letter from the Complainant Association dated 20-10-2016 Regional Manager HPC for releasing domestic LPG to allottees.

Exhibit B13- Copy of intimation in Form B dated 19-07-2014 from Deputy Chief Electrical Inspector for erection of 3 lifts.

Exhibit B14-Copy of letter dated 22-08-2016 from the Complainant to the 2nd Respondent.

Exhibit B15- Copy of commissioning Report dated 02-05-2017 with regard to LPG pipe line system.

Exhibit B16- Copy of Integrated consent to operate -Renewal dated 18-02-2018 from the Pollution Control Board.

Exhibit B17- Copy of occupancy certificate dated 10-08-2021.

Exhibits marked on the side of the Respondents 4 & 6

Exhibit B17- Copy of joint venture agreement date 07-02-2007 between 1st and 4th Respondents.

Exhibits marked on the Official side

Exhibit X1- Copy of site inspection report received on 04-04-2023 from the Technical Officers of RERA.