

**BEFORE THE KERALA REAL ESTATE APPELLATE TRIBUNAL,
ERNAKULAM**

Present:- 1. Justice Sri. P. Ubaid, Chairperson,
2. Sri.V.K. Babu Prakash, Judicial Member

Tuesday, the 4th day of July, 2023

REFA. No. 71 of 2022

(Against order dtd 8/08/2022 in Complaint No. 245/2021)

Appellants:

Mr. Sanjay Gangadharan Nambiar & Mrs. Usha VR,
Flat No. 803, 8th Floor, IIDL Aerie, Shihab Thangal Road,
Panampilly Nagar, Kochi- 682036, Kerala

By Advs. Sri. Shameem Ahmed & Sri. Akhil Philip Manithottiyil

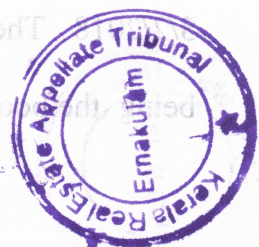
Vs.

Respondents

1. Sobha Limited, represented by its Managing Director Mr. Jagadish Nangineni – as per MCA records, Sarjapur Marathahalli Outer Ring Road, Devarabisanahalli, Bellandur Post, Bengaluru-560103.
2. Jagadish Chandra Sharma, Erstwhile Managing Director, Sobha Limited, B-2, 291, Sobha Ivory, No.7/1, St. Johns Road, Bangalore –560042. (Struck off as per Order dated 22/12/2022).
3. M/s Puravankara Ltd., represented by its Managing Director Mr.Ashish R, Puranvankara, No. 130/1, Ulsoor Road, Bengaluru-560042.

R1 & R3 By Advs. Sri.Abraham Mathew Vettoor &
Sri. Anil Abey Jose.

The appeal came up for final hearing on 20/06/2023, and the Appellate Tribunal on this day passed the following:

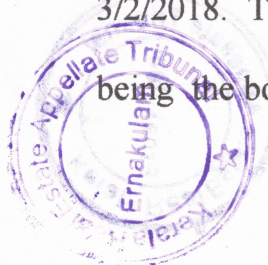


ORDER

Babu Prakash, Judicial Member.

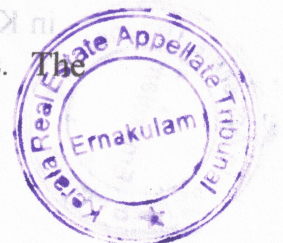
This is an appeal preferred under Section 44 of the Real Estate (Regulation & Development) Act, 2016 (herein after called, 'the Act') by the complainant, against the order dated 8/8/2022 passed by the Kerala Real Estate Regulatory Authority (herein after referred as 'the K-RERA') in Complaint No. 245/2021. There was a formal defect in the appeal memorandum. The appellants filed I.A.No.125/2022 to struck off the 2nd respondent. By order dated 22/12/2022 of this Appellate Tribunal, the 2nd respondent was struck off.

2. The complaint contains the following facts: The complainants are husband and wife. They are allottees of a project named 'Marina One' located at Kochi, developed by the respondents. The project is registered with the K-RERA under Section 3 of the Act. The complainants booked a residential apartment together with two car parking spaces for a total consideration of R. 3,29,05,554/-. Out of the total consideration payable, the appellants/complainants initially paid an advance amount of Rs. 63,50,245/- as demanded by the respondents. The said amount was paid in two instalments, firstly a sum of Rs. 11,20,000/- was paid as booking advance on 4/12/2017, and the second instalment of Rs. 52,38,245/- was paid on 3/2/2018. Thereafter, a further sum of Rs. 1,00,000/- was paid on 30/3/2018 being the booking advance amount for the interior works of the apartment.



On 13/3/2018 the respondents forwarded a draft agreement for sale to be signed and forwarded by the appellants/complainants. The agreement was not in compliance with the provisions of the Act. The appellants informed the respondents that the draft agreement was not acceptable as it contains clauses which are not acceptable to the appellants, and requested modifications. Without addressing the issue, the respondents vide letter dated 5/11/2018 further demanded an additional amount of Rs. 25,43,299/- in violation of Section 13 of the Act. The appellants were not willing to pay the amount as the agreement for sale was not modified in accordance with the provisions of the Act. Thus the appellants took a decision to cancel the booking of the apartment and to withdraw from the project. Notice was issued by the appellants demanding return of the amount with interest. The respondents refunded the advance amount paid by the appellants on different dates from 13/6/2019 to 21/6/2019, but refused to pay interest on them. On 3/7/2019 a lawyer notice was issued by the appellants to pay the interest for the amount from the date of receipt of the amount by the respondents. Thus the appellants filed the complaint seeking interest at the rate of 12% per annum for the advance amount paid from the date of its receipt till the date of return or payment.

3. The respondents filed objection as follows: It is true that Marina One is a project developed by the respondents, in which the appellants booked an apartment. The payment received by the respondents were credited in the joint escrow account. The appellants are aware of the above aspects. The



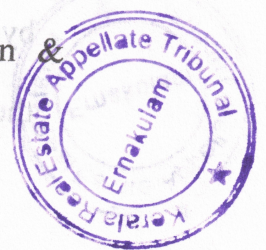
appellants executed an expression of interest dated 30/12/2017 followed by confirmation application dated 30/12/2017 requesting to accept the booking of the residential apartment with two car parking facility. It is true that the respondents received a booking advance of Rs. 11,20,000/-. On accepting the booking advance the respondents are duty bound to comply with the terms and conditions agreed upon by them with the allottees. It was on acceptance of such terms and conditions attached along with the said booking form that the appellants made payment of Rs. 52,38,244/- on 3/2/2018. It is also true that the appellants had remitted a sum of Rs. 1,00,000/- on 30/3/2018 as advance with respect to the interior works. Refund of the amount is also governed by the terms and conditions in the booking form. As per Clause 4 of the booking form, the appellants have agreed to execute the agreement for sale with respect to the undivided share in the land and the apartment. The agreement was in a standard format prescribed by the promoters which shall be executed within 30 days from 30/12/2017, the date of booking. Since the booking date is 30/12/2017, it is much prior to the introduction and implementation of the Real Estate (Regulation & Development) Act, 2016 in the State of Kerala. Therefore both parties are governed by the terms and conditions agreed upon. The respondents are not bound to accept the request made by the appellants seeking to review the agreement and modify the agreement in tune with the Real Estate (Regulation & Development) Rules, 2018 which came into force in Kerala only on 14/6/2018. The Kerala Real Estate Regulatory Authority



was formed on 5/10/2019. Hence the respondents are not liable to pay any interest.

4. After the filing of the appeal the appellants filed I.A.No.105/2022 for receiving certain additional documents in appeal and to mark them in continuation of the marking of the documents made by the K-RERA in the complaint. We cannot allow such a petition, as the documents sought to be produced were available with the appellants at the time of filing of the complaint, and no sufficient reasons are stated in the affidavit for non production of the documents in the RERA. Moreover those documents are not material for deciding the appeal on merits. Hence I.A.No.105/2022 is dismissed.

5. In the K-RERA the appellants/complainants produced 7 documents which are marked as Exts.A1 to A7. The appellants did not adduce any oral evidence. The respondents did not let in any evidence, either oral or documentary. The K-RERA without formulating any points for decision, after appreciating the facts, evidence, submissions and circumstances, dismissed the complaint on two grounds. One is that the complainants ought to have approached the K-RERA when violation was noticed under Section 13 of the Act, and to seek interference of the K-RERA for drafting an agreement in tune with the Act and Rules. This is not done by the appellants. The second one is that, as the appellants have withdrawn from the agreement, the K-RERA relied on Rule 10 of the Real Estate (Regulation &



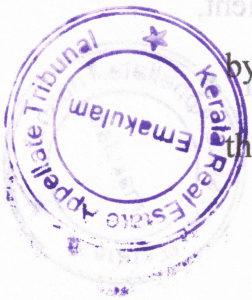
Development) Rules, 2018 and held that as per Clause 21 of the prescribed format of the agreement for sale occurring under Rule 10, the complainants are not entitled to get any interest on the payments made. On the above two grounds the complaint was dismissed. Aggrieved by the order the appellants/ complainants have come up in appeal.

6. The following points arise for consideration :

- i. Are not the appellants entitled to get interest on the advance amount paid by them with respect to the real estate project launched by the respondents ? If so, what is the rate of interest awardable ?
- ii. Whether the order of the K-RERA dismissing the complaint is justifiable or not ?
- iii. Reliefs & costs.

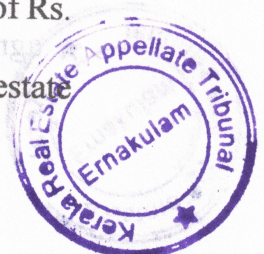
7. **Point Nos. i to ii** :- For the sake of convenience and for avoiding repetition of facts and evidences, the above points are discussed together.

The appellants are allottees in a project named Marina One located in Kochi, developed by the respondents. The said real estate project is a registered project with the K-RERA under Section 3 of the Act. The appellants booked a residential apartment together with two car paring spaces for a total consideration of Rs. 3,39,05,554/-. Out of the total amount an advance amount of Rs. 63,58,245/- was paid by the appellants. On 13/3/2018 the respondents forwarded a draft agreement for sale to be executed and signed by the appellants. Obviously, the draft agreement was not in compliance with the provisions of the Act, 2016. The appellants informed the respondents



that the draft agreement was not acceptable, hence modifications may be made in tune with the provisions of the Act. Although the respondents agreed for a modified draft agreement in tune with the Karnataka Real Estate (Regulation & Development) Rules, as in Kerala the Real Estate (Regulation & Development) Rules were not formulated and implemented, the respondents did not provide such a modified draft agreement. On the other hand the respondents demanded a further sum of Rs. 25,43,299/- on 5/11/2018 in violation of Section 13 of the Act. There upon the appellants issued a notice expressing their intention to withdraw from the project and to return the amount with or without interest. The respondents returned the amount without interest, but thereafter the appellants issued lawyer notice calling upon the respondents to pay interest at the rate of 12% per annum on the said amount from the respective payment dates till realization. The contention of the respondents is that they are not liable to pay any interest. There was a booking application executed and signed by the appellants, dated 30/12/2017 in which there are certain terms and conditions stipulated. As there were no rules prevalent in Kerala at that time under the Real Estate (Regulation & Development) Act, the respondents forwarded a draft agreement for sale in the standard format to be executed by the appellants. As the appellants did not comply with the same the respondents returned the advance amount, as demanded by the appellants.

8. Admittedly the appellants/allottees paid a total advance amount of Rs. 63,58,245/- to the respondents on the offer of an apartment in the real estate



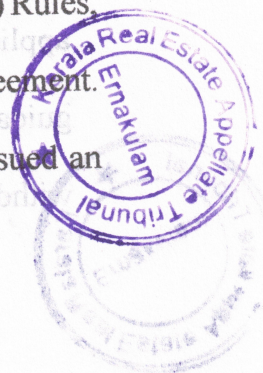
project named Marina One launched by the respondents. The first instalment of Rs. 11,20,000/- was paid on 4/12/2017, the second instalment of Rs. 52,38,245/- was paid on 3/12/2018, and the third instalment of Rs. 1 Lakh for the interior works was paid on 30/3/2018. All these payments were made after 1/5/2016 when Real Estate (Regulation & Development) Act, 2016 came into force in Kerala. Although the Real Estate (Regulation & Development) Rules were formulated on 4/6/2018, the Act came into force in Kerala when the notification in the official gazette was published by the Central Government on 1/5/2016. Since the advance payments were made by the appellants after the coming into force of the Act, the provisions of the Act are applicable in this case. The total sale value of the apartment sought to be purchased by the appellants was Rs. 3,29,05,554/-. The respondents received an advance amount of Rs. 63,58,245/-. This is more than 10%. It comes approximately to 20%. This is in violation of Section 13 of the Act 2016. Section 13(1) says that a promoter shall not accept a sum more than 10% of the cost of apartment, plot or building as the case may be as advance payment or application fee from a person without first entering into a written agreement for sale with such person and register the said agreement for sale under any law for the time being in force. Without executing such an agreement the respondents collected amounts in excess of 10%, which is a violation of Section 13(1) of the Act. The argument of the counsel for the respondents is that the Rules were framed, with regard to the format of agreement for sale, only on 14/6/2018 in Kerala, and therefore the



respondents could not draft an agreement in tune with Rule 10 of the Kerala Real Estate (Regulation & Development) Rules regarding the agreement for sale. Thus the respondents are entitled to draft an agreement in a standard format prescribed by the respondents. Such a draft agreement was forwarded to the appellants for execution. The appellants contend that some of the clauses in the draft agreement were not acceptable to them as they were in violation of the provisions of the Act. Thus they demanded the respondents to rectify the mistake by forwarding a modified draft agreement.

Ext.A3 is an e-mail communication dated 13/3/2018 issued by the Assistant Manager, Sales of the 1st respondent intimating the appellants that a draft sale and construction agreement is forwarded herewith for his reference. The appellants replied to it by e-mail dated 21/3/2018 stating that they cannot accept the draft agreement as the clauses are one sided and not in compliance with the RE(R&D) Act, therefore the legal team of the respondents may draft an agreement in terms of the RE(R&D) Central Rules. To that reply the same Assistant Manager, Sales of the respondents gave a reply to the appellants stating that the RE(R&D) Rules are not implemented in Kerala, and therefore the appellants may execute the agreement which shall later be modified when the Rules are implemented. To that letter, the appellants again replied by e-mail communication dated 28/3/2018 calling upon the respondents to modify the draft agreement in tune with the RE(R&D) Rules, without which the appellants cannot accept and execute the draft agreement.

To that letter the Commercial Operation Head of the respondents issued an



e-mail letter dated 12/7/2018 informing the appellants that the respondents are in the process of adopting the Karnataka RE(R&D) Rules format for their customer agreement to be executed until the Kerala Rules are framed. However, the respondents did not forward such a draft agreement in tune with the Karnataka Rules. There upon the appellants issued a lawyer notice dated 14/3/2019 informing the respondents that they are withdrawing from the project and the respondents shall return the advance amount with reasonable interest.

9. Section 12 of the RE(R&D) Act says that where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of the information contained in the notice of development or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage, he shall be compensated by the promoter in the manner as provided under this Act. The proviso says that, if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under the Act. Although Section 12 is not strictly applicable to the facts of this case, the principle can be examined for guidance. Section 12 postulates two circumstances. (1) That an allottee can withdraw from the proposed project before entering into an agreement with



the promoter. It is a pre-agreement stage. (2) Even at that stage the allottee is entitled to get back the entire amount paid by him as advance with interest.

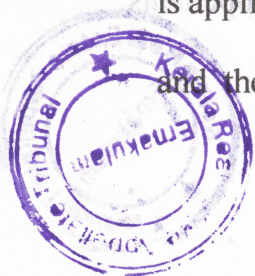
This principle is applicable to the facts involved in this case as well. The appellants paid advance amount to the project and the respondents collected the amount in excess of 10% in violation of Section 13 without executing an agreement for sale. When the appellants demanded a modified draft agreement in tune with the RE(R&D) Act, it was not complied with by the respondents. This is a pre-agreement stage as contemplated under Section 12 of the Act. Since the modified draft agreement as suggested by the respondents is not provided with, the appellants are legally entitled to withdraw from the project and claim advance amount with interest. Although the appellants demanded to return the advance amount with interest by Ext.A3 legal notice dated 14/3/2019, the respondents refunded only the advance amount but refused the interest. Since there is violation of Section 13 of the Act, the K-RERA has got power under Section 38 of the Act to impose penalty or interest when there is contravention of obligations cast upon the promoters. There is an obligation cast upon the promoter under Section 13 of the Act to execute an agreement for sale if he has collected amounts in excess of 10%. This is not done by the respondents. On the other hand they have forwarded a one sided draft agreement, which is not in tune with the provisions of the Act, and which cannot be accepted and acted upon by the appellants. Thus withdrawal from the project by the appellants



is legally justifiable under the provisions of the Act. The appellants are entitled to get interest for the amount.

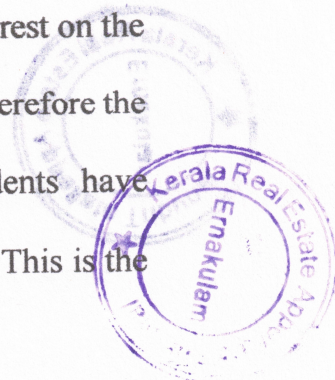
10. The observation and finding of the K-RERA that when there is violation of Section 13 of the Act, the appellants ought to have approached the K-RERA for rectification or modification of the agreement in tune with the Act and since the appellants did not approach the K-RERA, they are not entitled to get interest is not legally sustainable. It is the right and freedom of the appellants either to approach the K-RERA for rectification of agreement for sale, or withdraw from the project. They have withdrawn from the project and they are entitled to claim refund of the amount along with interest.

11. Another strange ground enunciated by the K-RERA for dismissing the complaint is that as per Rule 10 of the RE(R&D) Rules, an agreement for sale shall be executed by the promoter as well as allottee. Clause 21 of the prescribed format for agreement for sale contains a clause that when the allottee refuses to execute the agreement, he is not entitled to claim interest. It is an admitted fact that no such agreement was executed in this case. Without executing such an agreement Clause 21 in the format of the agreement cannot be relied on by the K-RERA to use against the appellants to reject the claim for interest. Further, Clause 21 in the prescribed format is applicable only when the promoter demanded execution of the agreement and the allottee refused the same. Here is a case where no such draft



agreement in tune with Rule 10 was forwarded by the respondents. Therefore, the applicability of Clause 21 in the format of agreement does not arise at all. An agreement not executed by the parties will not in any circumstance bound the parties.

12. On a consideration of the entire facts and evidence, we are of the considered view that the appellants are entitled to get interest for the advance amount paid by them. Moreover this is a commercial transaction in which a real estate project regarding the construction and sale of apartment was launched by the respondents. They have published advertisements, on the basis of which the appellants approached the respondents for purchasing an apartment in the project. They have paid a total advance amount of Rs. 63,58,245/- on different dates such as 20/12/2017, 3/2/2018 and 3/3/2018. Since the draft agreement in compliance with the provisions of the RE(R&D) Act is not furnished by the respondents, the appellants withdrew from the project and claimed return of advance amount with interest. A legal notice was issued to the respondents. The respondents returned the advance amount of Rs. 63,58,245/- without interest on 13/6/2019, 14/6/2019 and 21/6/2019 respectively. The respondents utilized the amount paid by the appellants as advance for a period of more than 18 months. Thus, when that amount is returned, the respondents are legally bound to pay reasonable interest on the same for the said period. This is not done by the respondents. Therefore the appellants are entitled to get interest on the same as the respondents have utilized the amount for the purpose of their commercial venture. This is the



general law of contract. The findings of the K-RERA dismissing the complaint are therefore not legally sustainable in the eye of law. The points found accordingly.

13. **Point No.iii:** Regarding the interest Section 2(z) of the Act says that "interest" means the rates of interest payable by the promoter or the allottee, as the case may be. Explanation (ii) says that the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded. Applying this principle the appellants are entitled to get interest on the advance amount paid by them from the respective date of payment stated hereunder till realisation. Thus the appeal is allowed and the appellants are entitled to get interest at the rate of 12% per annum on the advance amount paid as follows:

- a. Interest at the rate of 12% per annum on the amount of Rs. 11,20,000/- from 4/12/2017 till realization or payment.
- b. Interest at the rate of 12% per annum on the amount of Rs. 52,36,245/- from 3/2/2019 till realization or payment.
- c. Interest at the rate of 12% per annum on the amount of Rs. 1,00,000/- from 3/3/2018 till realization or payment.



The appellants are also entitled to get a cost of Rs. 5,000/- (Rupees Five Thousand only) from the respondents and their assets.

14. In the result, the appeal is allowed with cost.



Sd/-
Justice P.Ubaid
Chairperson

Sd/-
V.K.Babu Prakash
Judicial Member

//True copy//

Copy delivered on: 05/07/2003


Registrar (in charge)

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