



GOA REAL ESTATE REGULATORY AUTHORITY

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F.No:4/RERA/Adj. Matters (1)/2020 / 399

Date: 11 /05/2023

BEFORE THE ADJUDICATING OFFICER

Mrs. Mary A. Custodio D'Souza,
H.No. 916, Pequeno Peddem,
Anjuna, Bardez, Goa-403509.

.....Applicant/Complainant

V/s

M/s Joma Builders,
Through its sole proprietor
Mr. Joaquim Mariano D'Souza,
Flat No.G/1, Ground Floor,
'MARYLAND APARTMENT',
Abbaxio Vaddo, Verla, Canca,
Bardez-Goa, 403510.

..... Respondent/Promoter

Learned Advocate Shri S. B Sawkar for the Applicant/Complainant.

Learned Advocate Shri N. Naik for the Respondent/ Promoter.

ORDER

(Delivered on this 11th day of month of May, 2023)

The present proceedings have arisen as a corollary to the complaint under Section 31 of the Real Estate (Regulation and Development) Act, 2016 filed by

the applicant/complainant against the respondent bearing complaint no. 3/RERA/Complaint(316)/2022.

2. The above said complaint was disposed off partly in favour of the applicant/complainant vide Order dated 23.08.2022 of the Goa Real Estate Regulatory Authority (for short 'Goa RERA'). The said Authority directed the respondent as following:-

“ a) Respondent is directed to refund the entire amount of Rs. 28,00,000/- paid by the complainant along with interest @10% per annum within 60 days. The interest payable will be from the date of deposit of each installment by complainant to the respondent as shown in the para 7 of this order till the date of payment by respondent or till it is recovered as per law.

b) For the purpose of determination of compensation, the matter is referred to the Adjudicating Officer under Section 71 of the said Act as discussed in para 9 of this order.

c) For non registration of the project within stipulated time, the penalty of Rs. 5,00,000/- is imposed on promoter/respondent which should be paid by promoter/respondent within 60 days. The promoter is also directed to obtain the registration under the Act by submitting all the relevant documents to the Authority simultaneously.

The amount of refund along with interest will be payable by promoter/respondent to complainant directly while amount of

penalty shall be deposited with the Authority within stipulated time.”

3. Thereafter the said matter came before this Forum under Section 71 of the Real Estate (Regulation and Development) Act, 2016.
4. The applicant/complainant filed her claim for compensation in Form ‘B’ at exhibit 112/c seeking compensation under four sub heads totalling ₹11,75,000/- (Rupees Eleven Lakhs Seventy Five Thousand only).
5. In short the case of the applicant/ complainant is that she is an allottee in the project “Joma’s Martins Nest” being constructed by the respondent/ promoter through his proprietorship concern M/s Joma Builders. Initially an Agreement dated 17.03.2015 was executed between the parties wherein the respondent/ promoter agreed to construct the suit apartment bearing no. F-3 on the first floor in Block A of the said project for consideration of ₹31,92,750/- (Rupees Thirty One Lakhs Ninety Two Thousand Seven Hundred and fifty only) in the property situated in Survey No. 21/7 of Village Canca, Bardez Taluka. The possession of the suit apartment was to be delivered by November 2015. As the project was not likely to be completed by November 2015, a second Agreement dated 27.10.2015 was executed between the parties wherein it was agreed that delivery of possession of the suit apartment would be given by May, 2016. It is the applicant’s/complainant’s case that possession of the suit apartment has not been delivered to the applicant till date. The applicant/complainant has so far paid ₹28,00,000/- (Rupees Twenty Eight Lakhs only) out of the agreed total

consideration of ₹31,92,750/- Rupees Thirty One Lakhs Ninety Two Thousand Seven Hundred and fifty only). Hence, the applicant/ complainant has sought for a total compensation of ₹11,75,000/- more particularly set out in the claim at exhibit 112/c.

6. The respondent/ promoter filed reply at exhibit 170/c opposing the said claim for compensation.
7. The respondent/ promoter in the reply has raised two preliminary objections namely a) that Adjudicating Authority has no jurisdiction to decide the subject matter of the claim/ complaint under the Real Estate (Regulation and Development) Act, 2016. b) that the Agreement dated 17.03.2015 and the construction of the apartment by the respondent is much before the commencement of the Act and hence this Authority has no jurisdiction to decide the subject matter of the claim.
8. The respondent/ promoter has stated that the applicant/ complainant has averred false facts to make out a case which she is not legally entitled to.
9. It is the case of the respondent/ promoter that vide Agreement of Sale and Development dated 05.11.2008 duly registered before the Office of the Notary at Mumbai on 06.11.2008, the original owners viz; Mrs. Livia Martin, Mrs. Maria Braganza, Mr. Alban Braganza, Mrs. Mildred D'Silva and Mr. Jeffrey D'Silva had authorised M/s Joma Builders to carry out development by constructing a building/s in their property bearing Survey No. 21/7 of Village Canca. Pursuant to which they have executed a General Power of Attorney

dated 05.11.2008 duly executed before Notary on 06.11.2008. It is also stated that permission has been granted by Town and Country Planning Department, North Goa on 10.02.2010. The PWD had granted approval vide permission dated 06.07.2010. Village Panchayat of Verla-Canca had granted Construction License dated 21.12.2010. It is stated that the project including the said apartment is complete in all respect and is at the stage of final furnishing on the ground floor. It is stated that the project could not be completed within the given schedule as the situations were beyond the control and on account of the restrictions from the concerned local and government authorities and more particularly on account of the on-going covid pandemic, the project could not reach to its completion. The respondent/ promoter has denied the case of the applicant/ complainant as set out in the said claim for compensation.

10. The applicant/ complainant filed her Affidavit in Rejoinder at exhibit 226/c.
11. The applicant/ complainant filed her Affidavit in Evidence at exhibit 236/c. The respondent/ promoter filed his Affidavit in Evidence at exhibit 248/c. The applicant/complainant filed Affidavit in Rebuttal to the respondent's Affidavit at exhibit 332/c.
12. Written arguments were filed by the Advocate for applicant/complainant at exhibit 348/c. Written arguments were filed by Advocate for respondent at exhibit 368/c. Written arguments in reply were filed by Advocate for applicant/complainant at exhibit 378/c. Oral arguments were heard.

13. The points for determination and my findings to the same are as follows:-

| Sr. No. | Points for determination | Findings |
|----------------|---|--|
| (a) | <i>Whether the Adjudicating Officer has no jurisdiction to decide the subject matter of the claim?</i> | <i>In the negative.</i> |
| (b) | <i>Whether the respondent/promoter is liable to compensate the applicant/ complainant as set out in the claim for compensation?</i> | <i>Partly in the affirmative as per order.</i> |

REASONS

Point (a)

14. Ld. Advocate Shri N. Naik for the respondent/promoter has submitted that the Adjudicating Officer has no jurisdiction to decide the subject matter of the claim under the Real Estate (Regulation and Development) Act, 2016 as the Agreement dated 17.03.2015 and construction of the apartment is much before the commencement of the said Act. On the other hand Ld. Advocate Shri S. B. Sawkar for the applicant/complainant submitted that the said Act has been notified on 26.04.2016 and has come into force on 05.06.2016. Shri S. B. Sawkar submitted that in terms of the said Act and Rules in case of on-going project where completion certificate has not been obtained from the competent authorities, the claim by way of compensation falls within the jurisdiction of the Adjudicating Officer. Shri S. B. Sawkar submitted that the respondent has till

date failed to obtain the completion certificate and secure occupancy certificate even after the filing of the complaint and the application for compensation.

15. In the case of **“M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP and Ors. dated 11.11.2021”** in civil appeal no.(s) 6745-6749 of 2021, the Apex Court considered the aspect whether the Real Estate (Regulation and Development) Act, 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the constitution of India. It was held that from the scheme of the Act, 2016 its application is retroactive in character. It can safely be observed that the project already completed or to which 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.
16. In the present case though the agreements dated 17.03.2015 and 27.10.2015 were executed prior to the coming into force of the said Act there is no dispute that the project is an on-going project and the completion certificate and the occupancy certificate have till date not been obtained by the respondent/ promoter. The issue of non-registration the said project was considered by the Hon’ble RERA Authority which imposed a penalty of ₹5,00,000/- (Rupees Five lakhs only) on the respondent/ promoter with a direction to the respondent/ promoter to obtain the registration under the said Act. Therefore, the objections



raised by Ld. Advocate for respondent/promoter cannot be sustained. Point (a) is, therefore, answered in the negative.

Point (b)

17. Ld. Advocate Shri S. B. Sawkar for the applicant/ complainant has submitted that the applicant/ complainant has sustained substantial losses due to the defective title and continuous delay in non delivery of the suit apartment within the stipulated period of November 2015 and further extended period on or before May 2016. In this context the applicant/ complainant has sought a total compensation of ₹11,75,000/- (Rupees Eleven Lakhs Seventy Five Thousand only) which she has claimed under four sub heads namely (i) losses due to defective title ₹4,00,000/-; (ii) losses on investment of (₹28,00,000/-) ₹5,00,000/-; (iii) Medical treatment, mental tensions, agony and undue hardships ₹1,50,000/-; and (iv) Fees, litigation costs, lawyer's fees, travelling expenses ₹1,25,000/-.
18. Section 18 of the Real Estate (Regulation and Development) Act, 2016 deals with return of amount and compensation and is reproduced hereunder for ready reference:-

“18. Return of amount and compensation.- (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

- (2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.
- (3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules

or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.”

19. The broad factors to be considered while adjudging compensation has been provided under section 72 of the said Act which reads as under:-

“72. Factors to be taken into account by the adjudicating officer.- While adjudging the quantum of compensation or interest, as the case may be, under Section 71, the adjudicating officer shall have due regard to the following factors, namely:-

- (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
- (b) the amount of loss caused as a result of the default;
- (c) the repetitive nature of the default;
- (d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.”

20. In the case of ONGC LTD. v. SAW PIPES LTD. (2003) 5 Supreme Court Cases 705. The Apex Court while dealing with Section 73 and 74 of the Contract Act has held that:

“(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract

unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

21. Coming to point (i) Ld. Advocate Shri N. Naik for the respondent/promoter has submitted that the respondent has produced the survey records in Form I & XIV of Survey no. 21/7 of Village Canca, Taluka Bardez which shows the name of the occupants as 1) Benny Martins and 2) Anthony Victor Martins. Ld. Advocate Shri N. Naik submitted that in the Agreement for Sale and Development dated 05.11.2008, the widow of late Mr. Anthony Victor Martins i.e. Mrs. Livia Martins and other original owners namely Mrs. Maria Braganza, Mr. Alban Braganza, Mrs. Mildred D'Silva and Mr. Jeffrey D'Silva the owners of the said property have executed the said Agreement in favour of M/s Joma

Builders for the purpose of development of the said property. Shri N. Naik further submitted that pursuant to the said agreement for Sale and Development various authorities namely Town & Country Planning Department, North Goa, the PWD, Village Panchayat of Verla-Canca have granted permissions and construction license with respect to the said project.

22. Learned Advocate Shri S. B. Sawkar for the applicant/ complainant on the other hand submitted that, apart from Mr. Anthony Victor Martins, there is also Mr. Benny Martins shown in the occupant's column. No explanation has been given about the non-inclusion of Mr. Benny Martins in the said agreement for development. Shri S. B. Sawkar also submitted that the said Form I & XIV is merely a document of presumption and not a title document. Shri S.B. Sawkar submitted that no title documents have been produced such as Sale Deed, Gift Deed, Succession Deed, Inventory proceedings, heirship certificate nor any Title Investigating Report have been produced to duly certify the title of the said property stands in favour of the said Mrs. Livia Martins, Mrs. Maria Braganza, Mr. Alban Braganza, Mrs. Mildred D'Silva and Mr. Jeffrey D'Silva.

23. There is considerable merit in the arguments raised by Ld. Advocate for the applicant/ complainant. The applicant/ complainant has raised the issue of defective title at the very inception. The onus was therefore on the respondent/ promoter to have clarified and produced on record the relevant title documents

to establish the clear title to the said property bearing Survey No. 21/7 of Village Canca, Bardez Taluka which the respondent/ promoter has failed to do.

24. There is also no dispute that there has been a continuous delay in non-delivery of the suit apartment to the applicant/ complainant by the respondent/ promoter from May, 2016 to till date. It is the contention of the respondent/ promoter that the delay in delivering possession of the suit apartment is on account of the restrictions from the concerned local and government authorities and on account of the on-going covid pandemic. Firstly, the respondent/ promoter has failed to spell out what were the restrictions from the concerned local and government authorities. Secondly, as far as the on-going covid pandemic is concerned, the same came into play only in March 2020 whereas the suit apartment was agreed to be delivered four years earlier by May 2016. Therefore, there is no substance in the contentions raised by the respondent/ promoter.

25. The applicant/ complainant has claimed compensation of ₹4,00,000/- on the ground of defective title. However, the fact remains that the applicant/ complainant had also claimed refund of the amount invested of ₹28,00,000/-. By the Order dated 23.08.2022 the Real Estate Authority has ordered refund of the amount of ₹28,00,000/- with interest @ 10% p.a. till date of payment by the respondent or till it is recovered as per law. Admittedly, the applicant/ complainant has already chosen not to take possession of the suit apartment. Therefore, to my mind the applicant/ complainant can be adequately

compensated on this count in the amount of ₹1,00,000/- (Rupees One Lakh only) by the respondent/ promoter.

26. Coming to point (ii), Ld. Advocate for the applicant/ complainant has submitted that the applicant/ complainant in order to make the investment of ₹28,00,000/- has pledged her gold ornaments by obtaining bank loans and has paid interest on the loans including sale of gold ornaments to goldsmith from Mapusa and sustained loss of borrowings in cash. In this context, the applicant/ complainant has claimed a sum of ₹5,00,000/- (Rupees Five Lakhs only).
27. The applicant/ complainant has produced bank statement of the Goa Urban Cooperative Bank with respect to Gold Loan obtained of ₹3,50,000/- and ₹1,50,000/-. The applicant/ complainant has also produced two receipts of sale of gold of ₹2,15,000/- and ₹1,00,000/-. To my mind, the applicant would be entitled to interest paid on the said gold loans taken which works out to ₹29,181/- (Rupees Twenty Nine Thousand One Hundred and Eighty One only) as well as for the losses sustained on her investment of ₹28,00,000/- (Rupees Twenty Eight Lakhs only).
28. In the case of **Ghaziabad Development Authority versus Balbir Singh (2004) 5 Supreme Court Cases 65** it was held that in cases where monies are being simply returned then the party is suffering a loss in as much as he had deposited the money in the hope of getting a flat/plot. He is being deprived of that

flat/plot. He has been deprived of the benefit of escalation of the price of that flat/plot. Therefore the compensation in such cases should necessarily be higher.

29. Taking into consideration the claim of the applicant/ complainant on this count the applicant/ complainant would be entitled to compensation from the respondent/ promoter for the losses sustained by her which can be assessed at ₹2,00,000/- (Rupees Two Lakhs only).

30. Coming to point (iii), the applicant/ complainant has produced a certificate from Dr. Prithvi Amonkar dated 23.05.2022 certifying that the applicant Mrs. Mary A. Custodio D'Souza is suffering from Diabetes Mellitus and Hyper Tension both stress induced since past 06 years. The applicant/ complainant has not produced any receipts of doctor's fees as well as medical prescriptions and pharmacy bills of medicines purchased. However, the fact remains that the applicant/ complainant was made to undergo mental tension, agony and undue hardships for the last 06 years having not been handed over possession of the suit apartment by the respondent/ promoter as agreed. In this context, the applicant/ complainant is entitled to be compensated in the amount of ₹1,00,000/- (Rupees One Lakh only) by the respondent/ promoter.

31. Admittedly, the applicant/complainant was required to file the complaint before the Real Estate Authority and the present claim for compensation for which the applicant/ complainant had to deposit a sum of ₹5000/- (Rupees Five Thousand only) before the said Authority and has also to pay unwarranted litigation costs,

lawyer fees for conducting both the matters before the Authority and this Forum including travelling expenses and costs. The applicant/ complainant has claimed a sum of ₹1,25,000/-. To my mind for the losses sustained on this count, the applicant/ complainant would be entitled to compensation of ₹50,000/- (Rupees Fifty Thousand only) by the respondent/ promoter. Point (b) is, therefore, answered partly in the affirmative.

32. As per Rule 18 of The Goa Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of interest and Disclosures on Website) Rules, 2017 the rate of interest payable by the promoter and the allottee shall be the State Bank of India highest Marginal Cost of Lending Rate plus two percent. At present, such lending rate of interest is 8.70 per annum. Hence, the respondent/ promoter is liable to pay interest at the rate of 10.70% p.a. for every month of delay to the applicant/ complainant by way of compensation on the aforesaid total amount of ₹4,50,000/- (Rupees Four Lakhs Fifty Thousand only).

33. Before parting with this order, it is necessary to mention that the applicant/ complainant filed her claim for compensation in Form 'B' on 12.12.2022. The respondent filed reply on 19.01.2023. The applicant/ complainant filed Affidavit in Evidence on 03.02.2023. The respondent and the Advocate for the respondent were absent on 03.02.2023 and received the copy of the same only on 20.02.2023. On 06.03.2023 Affidavit in Evidence of the respondent was filed.


On 28.03.2023 Affidavit in Rebuttal was filed by Advocate for Applicant/ complainant. On 11.04.2023 written arguments of applicant was filed. On 19.04.2023 written arguments of respondent were filed. On 27.04.2023 written arguments in rebuttal was filed by Advocate for the applicant on which day oral arguments were also heard. The matter stands disposed on 11.05.2023.

In the result, I pass the following:-

ORDER

The respondent/ promoter is directed to pay the applicant/ complainant compensation of ₹4,50,000/- (Rupees Four Lakhs Fifty Thousand only) for violations under Section 18 read with Section 71 of the Real Estate (Regulation and Development) Act, 2016 within 30 (thirty) days of this Order.

In default, the respondent/ promoter shall be further liable to pay the applicant/ complainant interest on the said amount of ₹4,50,000/- (Rupees Four Lakhs Fifty Thousand only) @ 10.70% p.a. till the date of payment/ realisation.


11/05/2023
(Ashley L.C. Noronha)
Adjudicating Officer,
Goa RERA