GOA REAL ESTATE REGULATORY AUTHORITY

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F.No.3/RERA/Complaint/(303)/2022/123 Date: 13/02/2023

Mahmadarafi Jangalisab Hosamani and Tabasum Mahmadarafi Hosamani
C/o Hanumant Patil,
Flat 507, C Block, 7thFloor,
Kim Heights Morod,
Mapusa, Goa, 403507. **.....Complainants**

Versus

Sunstar Homes,
Partner AnupVishramPrabhuWalavalkar,
National Narvekar Chambers,
Mapusa, Bardez, Goa, 403507. **.....Respondent**

ORDER
(Dated 13.02.2023)

This order disposes of the aforesaid complaint/supplementary complaint filed under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the RERA Act') wherein the complainants have prayed for the following reliefs:-

"(a) Interest from 1st May 2019 till date of handing over possession on the amount paid of Rs. 41.00 Lakhs plus stamp duty of Rs. 1.24 lakhs u/s 18 of the Goa RERA Act 2016.

(b) Compensation from developer from 1st May 2019 till date of handing over of possession.

(c) Order the developer to hand over the possession of the flat along with 1 (one) dedicated car park and full occupancy certificate with all amenities as committed in order to avoid further inconvenience to the complainant.

(d) Builder has committed the amenities in the brochure for advertisement of project, in case builder fails to provide the committed amenities, compensation be granted for this failure in proportion to amenities not provided as per Section 12 of the Act.

(e) Builder be directed to provide proper account along with supporting documents for expenses and charges for electricity transformer, society formation, infrastructure tax etc. and not to keep profit margin on this.

(f) Refund of consideration from promoter due to deduction of super built up area be granted for creation of additional interest of other allottees in the project on account of construction of two additional floors pursuant to which the multiplying factor for calculation for super built up area is reduced.

(g) Apart from refund, compensation be granted for alteration of sanctioned building plan and construction of two additional floors without consent of 2/3rdallottees of project as per section 14 of the Act.

(h) Direct builder not to harass allottee for collection of GST amount since as per terms agreed there is no such clause warranting collection of GST.

(i) Direct promoter to rectify structural defects.

(j) Direct promoter to utilize the funds from booking only for completion of project.

(k) Direct promoter to form legal entity of association of allottees of the project.

(l) Direct builder to pay to the complainant compensation and other costs including legal costs incurred for filing of complaint and suffering mental agony due to delay in handing over of possession.

(m) It is pleaded to adjust the interest and compensation payable to be adjusted against consideration payable to promoter builder."

2. According to the complainants, the agreement of sale was executed between them and the respondent on 14.05.2019 and the same was registered on the same day, whereby it was agreed that the respondent would construct and sell flat bearing no. D-5 admeasuring 96 sq. mtrs. super built up area on the third floor of the building of the project called Tara Garden Phase-II in the property bearing chalta no. 52 PT Sheet no. 115 of Khorlim, Mapusa, Goa and the date of completion of the said flat was 1st week of May 2019.

3. The complainants have submitted that they paid an amount of Rs. 41.00 Lakhs to the respondent out of the total consideration of Rs. 43.00 Lakhs. It is stated that the promoter has managed to get part occupancy certificate on 15.11.2021 however the construction work is still pending. It is further stated that the promoter has failed to update project completion stage on the website of Goa RERA and also other necessary updates and since the complainants have lost faith in the promoter they have kept further payments to the respondent on hold.

4. The complainants have raised various grievances in the complaint such as non completion of project as per committed construction and amenities; Compensation for delayed completion of project from the committed day of completion; respondent not providing details along with proof of expenses for charges and other levies demanding from the complainants; construction of additional two floors on building without consent of allottees; the respondent not disclosing multiplying factor as per RERA and super built up area and not disclosing the carpet area as per provisions of the RERA Act; Since the promoter has created additional interest in the project, there is reduction in the proportionate loading factor for calculation of super built up area and the

proportionate share in the common area is reduced and accordingly area of 96 sq. mtrs. super built up area is reduced and the promoter should grant refund for the area so reduced; incorrect demand of GST on the consideration amount by the respondent; structural defect in the construction; there should be proper utilization of funds collected from bookings for the project and the respondent should form legal entity as per clause (e) of sub section (4) of Section 11 of the RERA Act.

5. The respondent filed the reply wherein preliminary objections are taken to the effect that the complaint is not maintainable since the complainants failed to pay the outstanding consideration amount informed to them by possession letter issued to the complainants and also due to the arbitration clause in the said agreement. It is stated by the respondent that there has been no violation or contravention of any of the provision of the RERA Act or rules or regulations.

6. According to the respondent, the respondent had already applied for completion certificate with the NGPDA on 10.01.2020, however the said completion certificate remained pending due to covid 19 pandemic and as soon as the respondent received the completion certificate, the respondent applied for occupancy with Mapusa Municipality Council and after legal formalities part occupancy certificate was issued. The respondent has stated that the above fact of delay of receiving the completion certificate and thereby the occupancy certificate was time to time informed to the complainants, who never complained about the same till the filing of the present complaint after the complainants received the letter from the respondent asking them to make payment in order to receive the possession of the said flat.

7. According to the respondent, on receipt of the occupancy certificate, the respondent contacted the complainants and asked them to make the payment

towards transformer, infrastructural charges, maintenance, society formation, house tax etc. to enable the respondent to issue the possession letter but the complainants refused to make payment and thereafter the respondent issued them the possession letter dated 22.12.2021 stating therein that the possession of the apartment would be given to them subject to balance payment mentioned in the said letter. The respondent referred, in this regard, to clause 18 of the said agreement to sell.

8. According to the respondent, the delay cannot be attributed to the respondent as the same was beyond the control of the respondent and that due to covid 19 pandemic, the respondent suffered huge financial loss. It is stated that since the complainants refused to make the payment and preferred the present complaint, the respondent issued them notice of termination dated 02.08.2022 intimating them about the termination of the said agreement dated 14.05.2019.

9. According to the respondent, the construction work of the project is complete and the same is ready for possession. It is further stated that some of persons have taken possession of their premises after making payment to the respondent and have started residing there.

10. The complainants filed their reply to preliminary objections of the respondent stating therein that the respondent terminated the agreement for sale only after filing of complaint by the complainants and the same is bad in law. It is stated that the termination clause in the agreement of sale is unreasonable and is not in accordance with model clause of the agreement as given in the RERA rules, according to which three default reminders in respect of installment defaulted are to be sent to the allottee. It is also stated that the arbitration clause in the agreement to sell cannot be invoked in view of the RERA Act. Documents and affidavits have been filed by both the parties. Written submissions have been

filed by S. Teli, representative of the complainants and by Ld. Advocate P. Agrawal for the respondent. Oral arguments were also heard.

11. After going through the entire records of the case, the points which come for my determination along with the reasons and findings thereon are as follows:-

Sr. No.	Points for determination	Findings
1.	Whether this Authority has jurisdiction to try the instant complaint in view of the arbitration clause in the agreement for sale dated 14.05.2019?	In the affirmative.
2.	Whether this Authority has jurisdiction to try the instant complaint in view of the notice of termination of the aforesaid agreement for sale by the respondent?	In the affirmative.
3.	Whether the complainants are entitled for possession of the said flat along with interest on the paid consideration amount?	In the affirmative.
4.	Whether the promoter is liable to refund the amount of consideration as proportionate to reduced built up area?	In the negative.
5.	Whether the promoter is liable to pay penalty for violation of the provisions of the RERA Act?	In the affirmative.
6.	Whether the complainants are entitled for the compensation as prayed in the complaint?	To be decided by the Adjudicating Officer as per Section 71 of the RERA Act.

REASONS

Point No. 1

12. The Ld. Advocate for the respondent has referred to the arbitration clause in the agreement for sale and has argued that in view of the arbitration clause, this Authority has no jurisdiction to entertain and decide the instant complaint.

13. The reliefs as prayed in the complaint cannot be the subject of arbitration and the power to grant such reliefs cannot even be exercised by a civil court as Section 79 of the RERA Act bars the jurisdiction of the civil court to entertain any suit or proceedings in respect of any matter which the Authority or the Adjudicating Officer or the Appellate Tribunal is empowered by or under RERA Act to determine.

14. **Section 88** of the RERA Act states that "the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law" and **Section 89** of the RERA Act states that "the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force". Thus, impliedly the applicability of the arbitration is ousted for the disputes under the RERA Act, especially when one of the prime objectives of the RERA Act is to create a body for speedy dispute resolution and any law being inconsistent with the remedy provided under the Act, would be inapplicable to that extent. Furthermore, since the default of the provisions of the Act attracts penal consequences, the same would not be arbitrable. In the case of **"Natraj Studios Pvt. Ltd. vs. Navrang Studios" (1981) 1 SCC 523** the Hon'ble Supreme Court held that in the presence of a statutory remedy and a specific body having being established by law, parties should not be allowed to contract out of the statute. In the case of **"Skypak Couriers ltd. vs. Tata Chemicals ltd." (2000) 5 SCC 294**, the Hon'ble Supreme Court observed that "Even if there exists an arbitration clause in an

agreement and a complaint is made by the consumer, in relation to a certain deficiency of service, then the existence of an arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force".

15. The National Consumer Disputes Redressal Commission (NCDRC) post the amendment to section of the Arbitration Act held that "The disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable. The NCDRC referred to the provisions of the Act and relying on the decision in **"A. Ayyasamy vs. A. Paramasivam" (2016) 10 SCC 386** held that since Section 79 of the Act bars the civil court to adjudicate upon issues under the Act, real estate disputes falling within the scope of the Act would be unarbitrable. The said decision of NCDRC was upheld by the Hon'ble Supreme Court in the case of **"Emaar MGF Ltd. vs. Aftab Singh" civil appeal nos. 23512-23513 of 2017, order dated 13.02.2018 (SC).**

Hence, it is well settled that the real estate disputes coming within the purview of the RERA Act are not arbitrable. The instant point is therefore answered in the affirmative.

Point No.2

16. Under **Section 11(5) of the RERA Act**, the promoter may cancel the allotment only in terms of the agreement for sale, however the allottee may approach the Authority for relief if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

17. In the instant case the respondent has sent a letter dated 15.03.2022 to the complainants Mahmadarafi Jangalisab Hosamani and Tabasum Mahmadarafi Hosamani informing them that the respondent was ready to give possession of the said apartment as the respondent has already received occupancy certificate from Municipal authorities and other electrical sanctions and further informing the complainants that the said possession will be given subject to the following payments apart from the balance payment of the complainant's housing loan account and GST:-

1. Transformer charges = ₹75,300/-
2. Meter charges= ₹25,000/-
3. Infrastructure charges = ₹14,400/-
4. Garden maintenance = ₹15,000/-
5. Society formation = ₹50,000/-
6. House tax = ₹1218/-

Total = ₹1,80,918/- (Rupees One Lakh Eighty Thousand Nine Hundred and Eighteen only).

18. Clearly the aforesaid demands of payment are not as per the agreement for sale dated 14.05.2019. No such amount is specified in the said agreement for sale. **Firstly**, the majority of the terms and conditions of the agreement for sale dated 14.05.2019 pertaining to the aforesaid demands of the respondent are inconsistent with the **Model Form of Agreement for Sale as given under 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 as annexure 'A' as per Rule 10(1) of the aforesaid rules.** It is clearly mentioned in the Explanatory Note in the aforesaid Model Form of Agreement as follows:-

> "This is a Model Form of Agreement, which may be modified and adapted in each case having regard to the facts

and circumstances of respective case but in any event, matter and substance mentioned in those clauses, which are inaccordance with the statute and mandatory according to the provisions of the Act shall be retained in each and every Agreement executed between the promoter and the allottee. **Any clause in this Agreement found contrary to or inconsistent with any provisions of the Act, Rules and Regulations would be void ab-initio.**" (emphasis supplied).

19. In the instant case the Agreement for sale executed between the promoter and the allottees is not as per the Model Form of Agreement for Sale as given in the aforesaid rules. **Secondly**, the aforesaid demands made by the respondent are contrary to the provisions of the RERA Act and rules. **Section 11(4) (a)** states as follows:-

" 11 (4) The promoter shall –

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allotteesas per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of Section 14, shall continue even after the conveyance deed of all

the apartments, plots or buildings, as the case may be, to the allottees are executed."

From the aforesaid it is clear that till the conveyance of the apartments, plots or buildings, as the case may be, to the allottees, the promoter is responsible for all obligations, responsibilities and functions under the provisions of the RERA Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale which no doubt, necessarily should be as per the Model Form of Agreement for Sale.

20. There is no mention of providing of transformers to the allottees in the agreement for sale and hence the demand of **transformer charges** made by the respondent is not as per the agreement for sale or as per the provisions of the Act, rules and regulations therein.

21. **Section 11(4) (d)** of the RERA Act reads as follows:-

"11(4) The promoter shall-

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees."

Thus it is the obligation and responsibility of the respondent to provide and maintain all the essential services in the said project till the taking over of the maintenance of the project by the association of the allottees. It is therefore the duty of the respondent to supply and maintain the electricity connection in the apartment till the taking over of the maintenance of the project by the association of the allottees. The respondent has demanded from the complainants **meter charges** of ₹25,000/-, however in the agreement for sale it is agreed between the parties that "the charges for obtaining electric connection

of required load shall be ₹5000/- for 3 phase electric connection." Thus, even otherwise the respondent cannot demand any amount beyond the agreement for sale.

22. The respondent has also demanded from the complainants **infrastructure charges and house tax**. In the agreement for sale there is a reference of infrastructure tax and house tax in respect of the said premises, which may be levied and collected by the competent authorities. The aforesaid terms in the agreement for sale between the parties are also inconsistent with the Model Form of Agreement for Sale wherein in clause 1(d), it is included as follows:-

> "The total price above excludes Taxes (consisting of tax paid or payable by the promoter by way of infrastructure tax, GST and Cess or any other taxes which may be levied in connection with the construction of and carrying out the project payable by the promoter) upto the date of handing over the possession of the apartment/plot."

From the aforesaid Model Form of Agreement, it is clear that all kinds of taxes like infrastructure tax, GST and Cess or any other tax which may be levied in connection with the construction of and carrying out the project is payable by the promoter upto the date of handing over the possession of the apartment/plot. In the instant case also, till the possession is handed over to the complainants, all such taxes have to be paid by the respondent.

23. The respondent has claimed charges for **garden maintenance**, however as stated above as per the provisions of Section 11 of the RERA Act, it is the responsibility of the promoter /respondent to maintain the premises and all the amenities till handing over the possession of the same to the allottees. Even

otherwise as per the terms of agreement for sale no such charges are payable by the allottees to the promoter.

24. The respondent has also demanded from the complainants charges for **society formation** which are in excess of the amount as mentioned in the agreement for sale. In the agreement for sale it is mentioned that ₹300/- per sq. mtr. of super built up area of the said premises will be charged as advance towards the expenditure involved in the formation of the society/entity and the expenses towards maintenance and provision of common amenities to the project and also towards the share in the management fee payable to the builders at the agreed rate of 20% on actual expenses done till formation of the society/entity and till the builders require the managing committee of such society/entity to look after the maintenance of the building and meeting common expenses on its own and it is also mentioned therein that ₹500/- will be the contribution towards share capital and membership fee of the society/entity. The representative of the complainants has rightly argued that the respondent, even otherwise cannot claim more amount than the amount specified clearly in the said agreement for sale executed by the parties.

25. **Thirdly**, it is material to note that for those specific charges as demanded by the respondent in the above letter, no documents/ receipts/ bills/ vouchers are produced on record by the respondent in support of the above additional expenses, except one electricity bill, even though the representative of the complainants has repeatedly informed this Authority in writing that no documents are produced on record by the respondent to prove the aforesaid charges as mentioned and claimed in the possession letter.

26. Though in the agreement for sale it is mentioned that "If the aforesaid amount so paid by the Prospective Purchasers is exhausted/ over before formation of the

Society/ Entity and/ or taking over of the maintenance by the Managing Committee, the Prospective Purchasers shall be liable to pay to the BUILDERS additional sums towards maintenance of the building/s, as may be demanded by the BUILDERS" and it is also mentioned therein that "The BUILDERS shall maintain a separate account in its book for recording the receipts and expenses, for the purpose of this clause", no document is produced on record by the respondent to show the actual expenses done and/ or that the amount paid by the prospective purchasers is exhausted/ finished and no book is produced on record by the respondent before this Authority to show that the respondent is maintaining a separate account in the book for recording the receipts and expenses. Thus, no such documents/ receipts etc. are produced on record by the respondent except an electricity bill, even though opportunity was given by this Authority to both the parties to place on record all the documents which the parties want to rely in support of their respective cases.

27. Even **Section 11(4) (g)** states that **the promoter shall pay all the "outgoings until he transfers the physical possession of the real estate project to the allottee or the association of allottees, as the case may be**, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, **municipal or other local taxes, charges for water or electricity, maintenance charges**, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions which are related to the project)" (emphasis supplied). Thus, it is the obligation and responsibility of the promoter/ the respondent to pay all the "outgoings" until possession is given to the allottee.

28. Because of the reasons stated above, the aforesaid demand of charges as made by the respondent in the aforesaid possession letter is illegal and being inconsistent with the Model Form of Agreement for Sale is deemed to be void

ab-initio. However, since the complainants have agreed to pay electric connection charges of ₹5,000/- for 3 phase electric connection and also to pay ₹300/- per sq. mtr. of super built up area of the said premises towards the formation of the society/ entity, the claim of the respondent is restricted to the aforesaid additional charges only. Needless to say that the complainants have to pay the balance sale consideration also before taking the possession of the said premises. Since the complainants did not take the possession of the said premises because of the illegal additional demand of money made by the respondent, the respondent terminated the agreement for sale. In the notice of termination of agreement for sale it is mentioned by the respondent that since the complainants did not take possession of the said premises by making payment towards GST/ service tax and other incidental expenses including balance payment, the said agreement for sale stands terminated. Because of the reasons stated above, it is clear that the promoter has not cancelled the allotment in terms of the agreement for sale and the complainants approached this Authority for relief as the complainants were aggrieved by such cancellation which was not in terms of the agreement for sale, not in terms of the Model Form of Agreement for Sale and not in consonance with the obligations and responsibilities of the promoter as mentioned in the provisions of the RERA Act and the Rules thereunder. The said cancellation for agreement for sale is therefore bad in law and has no validity in the eyes of law. Hence this Authority has jurisdiction to entertain and decide the instant complaint.

Point No. 3

29. As per the agreement for sale dated 14.05.2019, which was registered on the same day, the promoter shall "tender delivery of the said premises to the prospective purchaser on or before first week of May 2019". Initially, the date of execution of agreement was mentioned in the said agreement as 15th day of

March 2019 and hence in para 18 of the said agreement it was mentioned that the said premises would be delivered to the prospective purchaser "on or before first week of May, 2019". However, the said agreement for sale was registered on 14.05.2019 and the initial date of its execution was cancelled by hand and substituted by the date 14.05.2019. It is clear therefore that the date of possession in para 18 of the said agreement for sale was not changed by the parties accordingly. In the reply by the respondent to the complaint, the respondent has clearly mentioned in para 5 thereof that "the Agreement to Sale was executed on March 2020 and the respondent had agreed the date of completion in May 2020 since the respondent had already applied for completion certificate with the NGPDA on 10.01.2020". The said reply is supported by the affidavit of the respondent dated 09.09.2022 wherein, in para 2 thereof, the respondent has stated that "I say that at the outset, I repeat, reiterate and reaffirm and confirm the submission and averments in the reply to the complaint dated 08.08.2022 as if the same are specifically set out herein." It is clear therefore that on affidavit, the respondent has admitted that the date of possession of the said premises which was agreed between the parties was May 2020. Thus, there is a clear mistake in the date of possession given in para 18 of the agreement of sale as "on or before first week of May 2019" since the said date is not logical as the agreement for sale was executed between the parties and registered on 14.05.2019. Hence, the date of possession of the premises has to be considered as on or before first week of May 2020, which date is also admitted by the respondent in the reply and on affidavit.

30. Till date the possession of the said premises is not given to the complainants, who are entitled to claim possession of the same under **Section 19(3) of the RERA Act**, which reads as follows:-

> 19(3) "The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be and the

association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (c) of clause (1) of sub-section (2) of Section 4"

31. Since, till date the possession of the said residential unit is not given to the complainants, Section 18 of the said Act is therefore, squarely applicable and is quoted below:-

> **"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." (emphasis supplied)

32. From the aforesaid section it is clear that the complainants have the choice of either withdrawing from the project and asking for refund of the consideration amount paid by the complainants to the respondent with interest including compensation **or not to withdraw from the project and ask from the respondent "interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed".** As stated above, Section 18 of the said Act clearly gives right to the complainant to ask for statutory interest on the consideration amount paid for every month of delay till the handing over of the possession. In this regard, the ruling of the Hon'ble Supreme Court in the case of **"Imperia Structures Ltd. Vs. Anil Patni and Another" 2020 (10) SCC 783** is squarely attracted and hence the relevant part of the same is reproduced herein below:-

"25. In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. **The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the project. In the case, he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the allottee to proceed either under Section 18(1) or under proviso to Section 18(1)"** (emphasis supplied)

The instant case of the complainants comes under the latter category. The RERA Act thus provides a remedy to an allottee who does not wish to withdraw from the project to claim interest on the delayed possession till the handing over of possession to the allottee.

33. In this context it is relevant to quote **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 websites) Rules, 2017:-**

> **"18. Rate of interest payable by the promoter and the allottee.—** 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:
> Provided that in case the State Bank of India Marginal Cost of Lending Rate is not in use it would be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

34. Thus, invoking Section 18 and Rule 18 of the said Act the benefit of the aforesaid statutory interest goes to the complainants, who have entered into agreement for sale with the respondent. As a consequence thereof Section 18 and Rule 18 of RERA are squarely attracted in the instant complaint.

35. The cause of action accrued in favour of the complainants and against the respondent on the completion of the first week of May 2020 i.e. on 07.05.2020, on which date the respondent was liable to give possession of the said residential unit to the complainants. Thus, the date from which the interest on the consideration amount paid by the complainants is to be calculated is the date when the cause of action accrued in favour of the complainants. Therefore, the prescribed interest as per the aforesaid Rule 18 starts running from 07.05.2020 on the consideration amount paid by the complainants to the respondent.

36. According to the respondent, the construction could not be completed within the stipulated period as mentioned in the agreement for sale because of covid pandemic, unavailability of construction material, delay in getting the necessary approvals and certificates from the competent authorities etc. and hence the respondent is not liable to pay any interest on the consideration amount as per

Section 18 of the RERA Act since the respondent is not at fault. There is not merit in the aforesaid submissions since it is held by the apex court in the case of **"M/s Imperia Structures Ltd. vs. Anil Patni and another" 2020 (10) SCC 783** that **"non-availability of contractual labour, delay in notifying approvals cannot be construed to be force majeure events from any angle"** (emphasis supplied). In the case of **"M/s Newtech Promoters and Developers Pvt. Ltd. vs. State of UP and others" in civil appeal no. (s) 6745-6749 and 6750-6757 of 2021,** the Hon'ble Supreme Court has clarified that "if the promoter fails to give possession of the apartments, plot or building within the time stipulated under the terms of the agreement, then allottee's right under the Act to seek refund/claim/ interest for delay **is unconditional and absolute, regardless of unforeseen events or stay orders of the Court/ Tribunal"** (emphasis supplied). Thus, the grounds as stated by the respondent for delay in delivering of possession, will not come to the rescue of the respondent from legal liabilities under the RERA Act and corresponding legal rights accrued to the complainants under the said Act. Because of the reasons stated above, the rulings relied upon by the Ld. Advocate for the respondent, are not applicable in the instant case.

37. The Ld. Advocate for the respondent has further argued that the agreement for sale was executed on 14.05.2019 and registered on 14.05.2019 i.e. well after coming into force of the RERA Act and hence the respondent is not liable under the provisions of the RERA Act. The aforesaid argument is unreasonable since the project comes within the purview of the RERA Act and infact the respondent initially got the project registered under the said Act though the registration lapsed on 30.09.2019, for which the appropriate direction will be given herein to the respondent to take steps to extend the date of registration of the project.

38. It is also necessary to reproduce hereunder Section 37 of the RERA Act which gives power to this Authority to issue any direction to the party concerned :-

> "**37. Powers of Authority to issue directions.**-The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agent, as the case may be, as it may consider necessary and such direction shall be binding on all concerned"

Thus, this Authority has power to give direction to the respondent to complete the project and the legal formalities and to deliver possession of the premises to the complainants within the specific period as per the terms and conditions of the agreement for sale dated 14.05.2019 which are not inconsistent with the Model Form of Agreement and with all the amenities and facilities as mentioned in the said agreement for sale. Such a direction is warranted since the interest on delayed possession runs till the actual delivery of possession of the premises to the complainants. However, both the parties are only bound by the amenities and facilities as mentioned in the aforesaid agreement for sale, which is a concluded contract and not as per any advertisement, brochure etc. issued by the respondent, if any.

39. In the instant case the complainants have paid ₹41.00 Lakhs to the respondent out of the agreed consideration amount of ₹43.00 Lakhs. Under Section 18(1) of the said Act the complainants are entitled and the respondent is liable to pay to the complainants interest for every month of delay till the handing over of the possession, at such rate as may be prescribed. 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 by SBI is 8.60% per annum. Adding two percent to the said interest as per Rule 18, it comes to 10.60% per annum. Hence, the respondent is liable to pay 10.60% per annum interest for every month of delay to complainants on the aforesaid amount paid by complainants from the date of delivery of possession i.e. 07.05.2020, till the handing over of the possession to complainants.

The Ld. Advocate for the respondent has submitted that the interest on the delay in giving possession, if any, has to be calculated from the date of the expiry of registration and not as per the due date of possession as mentioned in the agreement for sale. There is no merit in the aforesaid arguments since it is well settled that the rights of the allottees are not affected by the period of extension of registration granted by this Authority. In the case of **"M/s Imperia Structures Ltd."** (supra), the Hon'ble Supreme Court held as follows:-

> "We may now consider the effect of the registration of the project under the RERA Act. In the present case, the apartments were booked by the complainants in 2011-2012 and the Builder Buyer Agreements were entered into in November 2013. As promised, the construction should have been completed in 42 months. The period had expired well before the project was registered under the provisions of the RERA Act. **Merely because the registration under the RERA Act is valid till 31.12.2020 does not mean that the entitlement of the concerned allottees to maintain an action stands deferred. It is relevant to note that even for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration.**"(emphasis supplied).

Thus in the instant case for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration.

The instant point is therefore answered in the affirmative.

Point No. 4

40. It is the case of the complainants that the promoter has constructed two additional floors on the building and therefore the promoter should refund the excess amount collected by loading the common areas and open terrace areas on the carpet areas of the flat, for deriving the super built up area of the flat i.e. 96 sq. mtrs. as mentioned in the agreement for sale. According to the complainants, since the promoter has created additional interests in the project, there is reduction in the proportionate loading factor for calculation of super-built up area and hence the promoter should refund for the area so reduced. It is also prayed that the promoter be directed to disclose the carpet area of the flat along with detailed calculations of multiplying factor for determination of super built up area. The aforesaid argument of the representative of the complainants is without any merits because it was for both the parties to mention the carpet area of the flat in the agreement for sale dated 14.05.2019 and at the time of executing the said agreement, the complainants did not ask for mentioning of the carpet area of the said flat in the said agreement for sale. Further, in the Model Form of Agreement for Sale it is mentioned that "if there is any reduction in the carpet area within the defined limit then promoter shall refund the excess money paid by allottee within forty five days with annual interest at the rate specified in 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 (hereinafter referred to as the said Rules) from the date when such an excess amount was paid by the allottee. If there is any increase in the carpet area allotted to allottee, the

promoter shall demand additional amount from the allottee as per the next milestone of the payment plan". However, in the instant case there is no mention of carpet area in the agreement for sale and hence no such direction as prayed by the complainants can be given to the respondent. However, the complainants are at liberty to ask for compensation from the Adjudicating Officer on this ground. The instant point is therefore answered in the negative.

Point no. 5

41. Under Section 61 of the said Act, if any promoter contravenes any other provisions of the said Act, other than that provided under Section 3 or Section 4, or the Rules or Regulations made thereunder, he shall be liable to a penalty which may extend upto five percent of the estimated cost of the real estate project as determined by the Authority. The promoter has not given the possession of the said premises to the complainant as per the date of delivery of possession as mentioned in the agreement for sale dated 14.05.2019 and hence has violated the mandate of Section 11(4) (a) of the RERA Act, regarding which the respondent is liable to pay ₹1,00,000/- (Rupees One Lakh only) as penalty.

The registration of the project of the respondent lapsed on 30.09.2019 and the respondent has not obtained the extension of the registration of the project and has therefore violated the mandate of Section 6 of the RERA Act. Even during oral arguments in the instant case, it was brought to the notice of the Ld. Advocate for the respondent by this Authority that the respondent has not applied for the extension of registration of the said project till that date. However, in the complaint bearing no. F.No.3/RERA/Complaint(284)/2021 "Irappa L. Patil and Savita L. Patil vs. Sunstar Homes", the respondent is already imposed penalty for non extension of the registration of the project and is also directed in the said case to take steps to obtain the extension of the

registration. Hence, no separate penalty and direction required on this ground in the instant complaint.

According to the complainants, the respondent has violated Section 14 of the RERA Act by constructing two additional floors without consent of 2/3rd allottees of the project. The floor plan showing only four floors in the said project is part and parcel of the agreement for sale between the parties. In this regard it is significant to reproduce hereunder the relevant portion of Section 14 (2) of the RERA Act:-

> **"14. Adherence to sanctioned plans and project specifications by the promoter.-**
>
> (1) .....
>
> (2) **Notwithstanding anything contained in any law, contract or agreement,** after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—
>
> (i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:
>
> Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an

authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii)any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building." (emphasis supplied).

The Ld. Advocate for the respondent has brought to the notice of this Authority clause 13 of the agreement for sale wherein it is mentioned as follows:-

"13. The Builders are entitled to alter the plans of the construction of the said premises as well as of the building wherein the said premises is to be constructed or even of the entire project, as per the requirement of the architect/ engineer or the sanctioning authorities."

Referring to the aforesaid clause in the agreement for sale, the Ld. Advocate for the respondent has argued that there has been no violation of Section 14 (2) of the RERA Act. There is no merit in the said argument of the Ld. Advocate for the respondent since the aforesaid term of the agreement for sale is subject to the mandate of Section 14 of the RERA Act. Section 14 (2) clearly stipulates that the said mandate is **"Notwithstanding anything contained in any law, contract or agreement."** The respondent had the right to alter the plans of the construction of the said premises as well as of the building wherein the said premises was to be constructed or even of the entire project but the said additions and alterations could have been done only with the previous consent of the allottees i.e. with the previous written consent of atleast 2/3rd of the allottees as per section 14(2) (ii) of the RERA Act. Since no consent of the allottees was taken as per the aforesaid mandate of law, the respondent violated Section 14 (2) of the RERA Act and hence is liable to pay penalty of ₹1,00,000/- (Rupees One Lakh only) in this regard.

Section 14 (3) which gives authority to allottee to approach this Authority for any structural defect or any other defect in workmanship, quality or provision of services etc. within five years from the date of handing over of the possession of the premises, is not attracted since the possession is yet to be taken by the allottee. The promoter is therefore liable to pay penalty under Section 61 of the RERA Act for violation of Section 11(4) (a) and Section 14 (2) as well as Section 6 read with Section 3 and Section 5 of the RERA Act. The instant point is therefore answered in the affirmative.

Point no. 6

42. Under Section 71 of the RERA Act, compensation under Sections 12,14,18 and 19 of the said Act has to be adjudged only by the Adjudicating Officer.

Accordingly, the prayer for compensation has to be referred to the Adjudicating Officer for adjudging the compensation, if any.

Moreover, the representative of the complainants has challenged the legality of the Part Occupancy Certificate obtained by the respondent in respect of project in question, however the said Part Occupancy Certificate cannot be challenged before this Authority on any ground and in this regard this Authority is not the proper Forum to look into the legality of the said Part Occupancy Certificate.

In the premises aforesaid, I pass the following order:-

ORDER

The respondent has stated in the reply as well as in the written submissions and oral arguments that the complainants' flat no. D-5 on the fourth floor of the building is ready for occupancy on issuance of Part Occupancy Certificate. The respondent is therefore directed to give possession of the said flat to the complainants with all the amenities and facilities as mentioned in the agreement for sale dated 14.05.2019 within two months from the date of this order upon taking the balance consideration amount as well as electric meter charges and society formation charges strictly as per the said agreement for sale dated 14.05.2019 from the complainants. Thereafter, the respondent shall comply the mandate of Section 11(4)(e) regarding the formation of an association of allottees/ society and other mandatory provisions of the RERA Act.

The complainants are directed to pay the aforesaid balance consideration amount and aforesaid charges to the respondent on the day of and before taking possession of the said flat.

Further, the respondent is directed to pay 10.60% per annum interest (present lending rate of interest by SBI which is 8.60 % per annum plus two percent) for every month of delay to the complainants on the aforesaid amount of ₹41.00 Lakhs paid by the complainants from 07.05.2020 till the date of delivery of possession to the complainants.

As per the discussion above, the respondent is directed to pay ₹1,00,000/- (Rupees One Lakh only) as penalty for violation of Section 11 (4) (a) of the RERA Act and directed to pay penalty of ₹1,00,000/- (Rupees One Lakh only) for violation of Section 14 (2) of the RERA Act. Thus, the total penalty of ₹2,00,000/- (Rupees Two Lakhs only) to be paid by the respondent within a period of two months from the date of this order. The said penalty amount, if realized by this Authority, be forfeited to the State Government.

The respondent is directed to file compliance report of this order within two months failing which further legal action will be taken by this Authority under the RERA Act for execution of this order.

The instant complaint is now referred to the Adjudicating Officer to adjudge compensation, if any, as per Section 71 of the said Act.

13/2/2023

(Vijaya D. Pol)
Member, Goa RERA