GOA REAL ESTATE REGULATORY AUTHORITY

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F.No:3/RERA/Complaint (380)/2023/1126 Date:23/08/2024

Mr. Jewel Anthony Gonsalves,
H.No. 1/1, DeuliVaddo, Arpora,
Bardez, Goa-403516. **.....Complainant**

Versus

M/s Expat Projects & Development Pvt. Ltd.,
A Private Limited Company
Incorporated under the Indian Companies Act,
Having its registered office at Carlton Towers,
A-Wing, 3rd Floor, Unit No. 301-314 , No-1,
Airport Road, Bangalore-560008
Represented by its Managing Director,
Mr. Santosh Shetty,
And having local address at A2-213, second floor,
Kadamba Plateau, Panelim Village, Tiswadi,
North Goa, Goa-403402. **.....Respondent**

ORDER
(Dated 23.08.2024)

Brief facts of complainant case: -

Somewhere in August 2012, complainant invested an amount of ₹20,43,000/- in the project, "Whispering Waters" situated at Patye-Mangeli, Dodamarg, Sindhudurg Maharashtra belonging to the respondent. In the year 2017, a respondent informed that it is unable to proceed with the said project.

2. Thereafter, respondent offered complainant a row house no. R-108 in its housing complex "Expat Vida Uptown Row House phase-I" situated at Panelim, Tiswadi Goa and accordingly an agreement to sell dated 16.07.2019 came to be executed between the complainant and the respondent for purchase of the said Row House for consideration of ₹79,40,000/-. Out of this amount the complainant has paid ₹57,69,366/- at the time of the execution of the agreement to sell. Till the date of filing of the complaint complainant paid a total sum of ₹85,41,911/- to the respondent towards the purchase of the said row house.

3. In terms of the agreement to sell the respondent was bound to deliver the possession of the row house to the complainant on or before 31.12.2020. The respondent failed to complete the project as per the terms of the agreement to sell and consequently also failed to deliver the possession of the row house to the complainant within the time stipulated in the agreement to sell.

4. In the circumstances, complainant filed present complaint claiming the relief of refund of sum of ₹85,41,911/- with interest at the rate of 10% per annum and compensation of ₹5,00,000/-towards mental as well as physical harassment caused to him by the respondent.

5. Upon receiving complaint, a notice was served on the respondent pursuant to which respondent appeared and filed reply.

The brief facts of respondent case: -

6. The complainant is an investor and not an allottee as defined under RERA Act 2016. The complainant has invested money in many projects of the respondent for ripping profits.

7. The complainant has requested the respondent to register agreement to sell for the purpose of income tax. The said agreement to sell was not to be enforced as the unit was to be sold to the new customer for higher price.

8. M/s Naiknavare is a party to the agreement to sell. Therefore, M/s Naiknavare is a necessary party to this proceeding.

9. The respondent disputed that the amount paid by the complainant to it is paid towards the purchase of the row house as alleged in the complaint. The respondent stated that the fact that an amount more than ten per cent of the total consideration is alleged to have been paid by the complainant at the time of entering into agreement to sell itself suggest that the said amount was paid as an investment and not towards the purchase of the row house. The amount which is more than the ten per cent of the purchase price of the row house is in violation of section 13 of the RERA Act.

10. The respondent stated, it was mutually decided by the parties to extend the time for delivering possession as per RERA license and the time stipulated in the agreement to sell would not be realistic time line. The date of giving possession of the row house stipulated in the agreement on 31.12.2020 was only a tentative date as the time for giving delivery of possession to the complainant of the row house was mutually extended to December 2023.

11. The respondent has stated that from March 2020 to April 2021 the pandemic was in full swing in Goa. Pandemic gave a serious setback to the respondent project as the laborers engaged by the respondent to undertake the construction of the project must go to their native places and was not available. The raw material was also not available to undertake the construction.

12. They stated that the agreement to sell is unenforceable. The complainant is not entitled for the refund of neither the amount nor the compensation as claimed in the complaint and prayed to dismiss the same.

13. In the course of hearing the complainant so the respondent filed their affidavits in evidence and produced the relevant documents which are on record.

14. Ld. Advocate Shri N. Dhumatkar on behalf of the complainant and Ld. Advocate Shri P. Shetty on behalf of the respondent filed written arguments.

15. Short points that arise for my determination are: -

1. Whether the complainant is entitled to get refund of amount of ₹85,41,911/- along with the interest from the date of payment of the same till receipt of actual refund of the entire amount?

   Ans: - Yes.

2. Whether complaint is entitled for compensation of ₹5,00,000/- towards mental as well as physical harassment caused to him by the respondent?

   Ans: - To be decided by the Adjudicating Officer.

REASONS

Point no. 1

16. Ld. Advocate Shri P. Shetty has submitted that respondent project got registered with RERA on 12.10.2018. The alleged Row house transaction occurred prior to registration of the project involving an amount more than ten per cent of the purchase price at the time of signing agreement to sell. There is no proof led by the complainant to show that payments were made in accordance with the agreement to sell. All these facts strongly indicate that the complainant might be

investors rather than genuine buyers. To substantiate fact that complainant is an investor and not allottee Ld. Advocate relied on the decision of Maharashtra Real Estate Regulatory Authority in the matter of **Omprakash Kariwala vs. Raj Arcades and Enclaves Pvt. Ltd. 2020 DGLS (mahaRERA) 29dated 02.01.2020.** Ld. Advocate further submitted that M/s Naiknavare Pvt. Ltd. is a party in the agreement to sell and as such is a necessary party in this proceeding. In absence of M/s Naiknavare as party to the proceedings no effective order can be passed. In support learned advocate relied on the decisions in cases of **State of Assam vs. Union of India and others 2010 DGLS (SC 765), State of HP vs. Milkhi Ram (Dead) 2003 DGLS (SC) 1254.** Ld. Advocate further submitted that there is no proper service on directors of the respondent so also the company thereby there is no proper opportunity given to the respondent to context the proceedings. Ld. Advocate further submitted that as per agreement to sell total consideration towards the sale of row house is shown as ₹79,40,000/- whereas complainant asserts he has paid ₹85,41,911/-. This discrepancy is not explained. Learned Advocate prayed to dismiss complaint.

17. Ld. Advocate shri N. Dhumatkar has submitted that the respondent did not deny that they have entered into agreement for sale as defined under Section 2(c) of the RERA Act in which the respondent have agreed to construct row house no. R-108 for total consideration of ₹79,40,000/- with undertaking to deliver the possession of the said row house to the complainant on or before 31.12.2020 as per the clause 6 of the agreement. Ld. Advocate referred to the receipt dated 19.07.2023 and submitted that the said receipt proves payment of ₹85,41,911/- by the complainant to the respondent towards said row house. That apart draft handing over letter dated 21.04.2023 attached to e-mail dated 10.05.2023 also shows about payment. Ld. Advocate further submitted that the e-mail communication shows

that the respondent has not obtained occupancy certificate till 11.07.2023. The contention of the respondent that handing over possession was delayed due to covid-19 is a weak defense. Ld. Advocate quoted section 18 and 19 of the RERA Act and submitted that these two sections squarely apply to the complainant case. According to learned Advocate the respondent has miserably failed to comply with the terms and conditions of the agreement with respect to the delivery of the row house as stipulated in the agreement to sell and as such the complainant was compelled to withdraw from the project and consequently is entitled to refund of the amount paid by the complainant to the respondent in the sum of ₹85,41,911/- along with the interest as well as compensation. Learned Advocate urged to grant the reliefs prayed in the complaint.

18. Now the rival contentions fall for determination. The complainant is seeking refund of amount of ₹85,41,911/-. The price of Row house is ₹79,40,000/-. According to the complainant he was made to pay additional sum of ₹6,01,911/- towards registration fees, lawyer's fees maintenance fees etc. Hence refund of ₹85,41,911/-. The additional sum of ₹6,01,911/- paid by complainant explains the discrepancy in the Row House price and amount claimed. I perused the receipt dated 19.06.2023 pointed out by learned advocate N. Dhumatker. It is issued by Ms. Malvina Franco the authorized hand of respondent wherein she has acknowledged receipt of total of ₹85,41,911/- by respondent from the complaint. Above receipt proves payment of total sum ₹85,41,911/- by complainant to respondent.

19. Sections 18 and 19 of the RERA Act 2016 make provisions for the return of the amounts and compensation. Relevant parts of the sections are reproduced herein below: -

"Section 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:....."

"Section 19 -Rights and duties of allottees.

(1) ....

(2) ....

(3) ....

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of

suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

(5) ....

(6) ....

(7) ....

(8) ....

(9) ....

(10) ....

(11) ...."

20. It can be seen from the combined reading of sections 18 and 19, that if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, 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 the Act.

21. The agreement to sell is dated 16.07.2019 and is executed between the respondent as a developer and complainant as the purchaser/ allottee. On page 14 in para-6 it is recited, "The developer shall give possession of the apartment to the allottee on or before 31st day of December 2020. If the developer fails or neglects to give possession of the apartment to the allottee on account of reasons beyond his control and of his agents by the aforesaid date then the developer shall be liable on demand to refund to the allottee the amount already received by him in respect of

apartment with interest at the same rate as may be mentioned in clause 4.(i) hereinabove from the date the developer received the sum till the date the amounts and interest thereon is repaid"

22. Since para-6 refer of para 4.1, it is necessary to reproduce para 4.1 as well. It states, "If the developer fails to abide by the time scheduled or completing the project and handing over the apartment to the allottee, the developer agrees to pay to the allottee, who does not intend to withdraw from the project, the penalty to the purchaser @10% per annum from the date of default till the date of actual handover. The allottee agrees to pay to the developer, interest as specified in the said rules, on all the delayed payment which become due and payable by the allottee to the developer under the terms of this agreement from the date the said amount is payable by the allottees to the developer."

23. It can be seen from above that, the obligation to give the possession of the row house to the complainant on or before 31st day of December 2020 is imposed on the respondent under the agreement which obligation in terms of Section 11(4) (a) of the RERA Act is binding on the promoter.

24. The question therefore is whether respondent honored its obligation of delivering possession of the Row house to the complainanton or before 31st day of December 2020. On this point the emails exchanged between the parties are relevant. Email dated 15.07.2021 by the respondent to the complainant informs the complainant of the completion of the next milestone of R-108. The email dated 15.12.2022 by the respondent to the complainant gives information to the complainant of the progress of the project as on 15.12.2022 with pictures. Email dated 01.03.2023 again informs complainant progress of the project with pictures. In email dated 23.03.2023 complainant enquires with the respondent as to when they will apply for the occupancy certificate in respect of row house R-108. In

another email dated 21.03.2023 complainant is asking respondent if respondent has applied for the occupancy certificate and when he will be able to take possession of the row house.In Email dated 20.04.2023 the respondent informs the complainant that villa R-108 is ready to be handed over and requested the complainant sometime to enable to keep all the documents ready before handing the row house to the complainant. In the email dated 03.04.2023 the complainant asked the respondent as to when he will get the occupancy certificate and able to move in the row house. In email dated 20.04.2023 the complainant asked the respondent as to whether they are handing the row house along with occupancy certificate. In email dated 10.05.2023 the respondent mailed handover letter to the complainant in respect of villa R-108. In email dated 10.05.2023 the respondent has informed the complainant that occupancy certificate is not yet applied. In email dated 11.08.2023 the respondent has informed complainant that his row house is ready and he can take possession.

25. It can be seen from above that till 11.08.2023 Row was incomplete. The various emails prove said fact. Therefore, default on the part of the respondent to complete construction and deliver possession of the row house to the complainant on or before 31st December 2020 stands proved. The complainant has volunteered to withdraw from the project. In these set of facts and circumstances as rightly argued by learned Advocate N. Dhumatker the complainant is entitled for the refund of the amount within meaning of section 18 and 19 of the Act.

26. The term "Allottee" is defined under clause (d) of Section 2 of the Act to mean the person to whom a plot, apartment or building has been allotted, sold in relation to a real estate project. In the agreement to sell on page 4 it is recited, "AND WHEREAS the allottee has agreed to purchase a row house in the housing complex named as EXPAT VIDA UPTOWN GOA ROW HOUSE PHASE I,

bearing no. R-108 on the ground and first floor being constructed in the first phase, together with the exclusive facilities specifically agreed to, if any, together with the exclusive right to use open space/ garden space attached to row house admeasuring 627 sq. ft. (approx.) of the said project, by the developer." On page 8 para 1.a (i) it is recited, "The allottee hereby agrees to purchase from the developer and the developer hereby agrees to sell said Apartment as mentioned in Schedule II and as shown in the Floor plan thereof hereto annexed for the consideration of Rs. 79,40,000/- which includes the proportionate incidence of common areas and facilities appurtenant to the premises, the nature extent and description of the common areas and facilities which are more particularly described in the Schedule annexed herewith"

27. It can be seen from recitals reproduce herein above that the complainant is a person to whom row house has been agreed to be allotted or sold. Being so, the complainant satisfies the definition of allottee as defined under Act. Therefore, the submission of Ld. Advocate P. Shetty that the complainant might be an investor and not allottee cannot be upheld.

28. In the matter of **Omprakash Kariwala vs. Raj Arcades and Enclaves Pvt. Ltd. 2020 DGLS (mahaRERA) 29 dated 02.01.2020** MahaRERA has found an MOU signed by the complainants and the respondent along with their affidavits that the amount received from the complainant by the respondent was towards investment done in the project by the complainant as investor and in the MOU it was agreed to cancel the agreement in which the complainant has agreed to purchase a flat in the respondent project. In these set of facts and circumstances MAHA RERA decided as above. The facts of above case and the facts of the present case do not match. Being so judgment is of no help to the respondent.

29. There is no evidence produced by the complainant that the alleged payment of Rs. 85,41,911/- is made in accordance with the scheduled of payment annexed to the agreement to sell. However, in the receipt dated 19.06.2023 the respondent has admitted having received total amount of ₹85,41,911/- as a consideration towards purchase of row house from the complainant. Mere fact that this payment is not in accordance with schedule of payments does not deprive the complainant the relief of refund.

30. Section-13 sub section 1 of the Act, prohibit promoter from accepting more than 10% of the cost of the apartment, plot, or building without first entering into written agreement for sale. In case in hand the complainant has admitted that he has paid and the respondent has received amount of Rs. 57,69,366/- from the complainant at the time of execution of the agreement. This receipt of amount by the respondent is in violation of section 13 for which the respondent is liable for the penalty. The complainant cannot be punished for the wrong done by the respondent. Being so argument that initial amount is more than 10% of the purchase price therefore complainant is not entitled for refund is also of no help to the respondent.

31. In the agreement to sell M/s Naiknavare construction Pvt. Ltd. is a party of the THIRD PART. They are the owners of the property wherein project of the respondent is undertaken. In the agreement to sell although they are made a party there is no obligation or responsibility cast on M/s Naiknavare vis a vis the allottee (complainant) with respect to the construction or delivery of possession of the row house nor there is any liability fixed on M/s Naiknavare to pay any interest for default in completing the construction and delivering the possession of the row house to the complainant. Being so, not making M/s Naiknavare party in this proceeding is not fatal to the complainant and for the same reasons the judgment in

the matters of **State of Assam vs. Union of India and others 2010 DGLS (SC 765), State of HP vs. Milkhi Ram (Dead) 2003 DGLS (SC) 1254** are of no assistance to the respondent.

32. The submission of Ld. Advocate for the respondent that there are no proper service on the directors of the respondent requires no appreciation as non-service of the notices does not affect the merits of the proceedings.

33. The contention of Ld. Advocate for the respondent that outbreak of covid-19 was fatal to the respondent and the pandemic has caused delay in completion of complainants row house is not answer to the delay in delivering the possession as it has been held in 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** that "if the promoter fails to give possession of the apartment, plot or building within the time stipulated under terms of the agreement, then allottee's rights under terms of the agreement, then allottee's rights 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." In view of above findings of the Apex Court pandemic plea to defeat right of complainant to get refund of amount fails.

34. Further contention of Ld. Advocate for respondent that it was mutually agreed between parties that the timeline for the delivery of possession of the row house was to be extended in accordance with license issued by RERA and that the date of delivery of possession 31.12.2020 mentioned in the agreement to sell is only a tentative date has not been substantiated by the respondent by producing any cogent material. Being so, this contention is also of no help to the respondent.

35. It can be seen from above that the complainant has proved that the respondent failed to deliver the possession of the row house within the period

stipulated in the agreement to sell. The complainant has proved that he has paid total amount of Rs. 85,41,911/- to the respondent towards purchase of row house R-108. It is proved that the complainant has withdrawn from the respondent project. Being so, the complainant is entitled to the refund of the consideration paid by him to the respondent within meaning of section 18 read with 19 of the RERA Act.

36. As regards interest for delay, it is relevant to reproduce Section 2(za) of the RERA Act along with the explanation:-

> "2(za) "Interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
> *Explanation.*-For the purpose of this clause-
> (i)....
> (ii) 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, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

37. Hon'ble Supreme Court in the case of **" Experian Developers Pvt. Ltd. vs. Sushma Ashok Shiroor" (2022) SCC Online SC 416"** has observed:-

> "22.1 We are of the opinion that for the interest payable on the amount deposited to be restitutionary and also compensatory, interest has to be paid from the date of the deposit of the amounts. The

commission in the order impugned has granted interest from the date of last deposit. We find that this does not amount to restitution. *Following the decision in DLF Homes Panchkula Pvt. Ltd. vs. DS Dhanda and in modification of the direction issued by the commission, we direct that the interest on the refund shall be payable from the dates of deposits. Therefore, the appeal filed by the purchaser deserves to be partly allowed. The interests shall be payable from the dates of such deposits.*"

38. Hon'ble Bombay High Court in the case of **"Neel Kamal Realtors Suburban Pvt. Ltd. and another Vs. Union of India and others" (2017) SCC Online BOM 9302** has observed:-

"257.....

The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money.

39. From the aforesaid discussion, it is clear that refund of the amount paid shall be along with interest starting from the date of receipt of such amount by the respondent as per **Section 2 (za) (ii) of the RERA Act** and not from any other date.

40. The complainant has paid amounts mentioned in column-3 on respective dates mentioned therein in column-1in the below table to the respondent towards Row house:-

6.12.2017	Down payment	2000000
31.12.2017	Down payment	500000
31.12.2017	Down payment	500000
31.12.2017	Down payment	2769366
5.12.2019	Towards the consideration	500000
29.04.2019	Registration/ lawyers fees	255400
20.12.2019	Towards the consideration	500000
31.01.2020	Towards the consideration	500000
12.02.2020	Towards the consideration	170634
03.06.2020	Towards the consideration	200000
11.02.2021	Towards the consideration &	500000

	club House Membership	
11.02.2021	Towards the maintenance when Applicable	146511
	Total	**8541911**

41. Hence, the prescribed interest as per the aforesaid Rule 18 would start running from the dates of the respective payments of the amounts. As per the Rule 18, 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 9.10% per annum. Adding two percent to the said interest as per Rule 18 comes to 11.10% per annum. Hence, the promoter/ respondent is liable to pay to the complainant an interest of 11.10% per annum on the total amount of ₹85,41,911 (Rupees Eighty Five Lakhs Forty One Thousand Nine Hundred and Eleven only) starting from the payments dates i.e. from 06.12.2017 on the amount of ₹20,00,000/-, from 31.12.2017 on the amount of ₹37,69,366/-, from 05.12.2019 on the amount of ₹5,00,000/-, from 29.04.2019 on the amount of ₹255400/-, from 20.12.2019 on the amount of ₹5,00,000/-, from 31.12.2020 on the amount of ₹5,00,000/- from 12.02.2020 on the amount of ₹170634/-, from 03.06.2020 on the amount of ₹2,00,000/-, from 11.02.2021 on the

amount of ₹5,00,000/- and from 11.02.2021 on the amount of ₹1,46,511/- till the actual return of the said amounts to the complainant.

In the circumstances, my answer to the point no. 1 is in the affirmative.

Point No. 2

42. To be decided by the Adjudicating Officer in terms of the law.

In the circumstances, I pass the following:-

O R D E R

The promoter/respondent is ordered to return/refund an amount of ₹85,41,911/- (Rupees Eighty Five Lakhs Forty One Thousands Nine Hundreds and Eleven Only) to the complainant, within 30 days from the date of this order.

The promoter/ respondent is ordered to pay to the complainant an interest @ 11.10% per annum on the total amount of ₹85,41,911 (Rupees Eighty Five Lakhs Forty One Thousand Nine Hundred and Eleven only) as under:- starting from 06.12.2017 on the amount of ₹20,00,000/-, from 31.12.2017 on the amount of ₹37,69,366/-, from 05.12.2019 on the amount of ₹5,00,000/-, from 29.04.2019 on the amount of ₹2,55,400/-, from 20.12.2019 on the amount of ₹5,00,000/-, from 31.01.2020 on the amount of ₹5,00,000/-, from 12.02.2020 on the amount of ₹1,70,634/-, from 03.06.2020 on the amount of ₹2,00,000/-, from 11.02.2021 on

the amount of ₹5,00,000/- and from 11.02.2021 on the amount of ₹1,46,511/- till the actual return/refund of the said amounts to the complainant.

As regards the relief of compensation, same shall be referred to the Adjudicating Officer for determination in terms of law.

The respondent/promoter is directed to file compliance of the order before this Authority within 60 days from the date of this order.

Proceedings closed.

23/8/2024.

(Cholu M. Gauns)
Member, Goa RERA