



GOA REAL ESTATE REGULATORY AUTHORITY

DEPARTMENT OF URBAN DEVELOPMENT

GOVERNMENT OF GOA

101, 1st Floor, 'SPACES' Building, Plot No. 40, EDC Patta Plaza, Panaji 403 001 GOA

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No.3/RERA/Complaint (275)/2021/523

Date: 08/07/2022

Mohammed Farah Memon

H.No. 316 C near Hari Mandir,

Malbhat, Margao South-Goa, 403601.

.....

Complainant

V/s

Gera Development Private Limited

Office at 200 Gera Plaza

Boat Club Road,

Pune Maharashtra, 411001.

.....

Respondent

ORDER

(Dated 07/07/2022)

This is to dispose of the complaint dated 22/12/2021 received on 31/12/2021 on the web portal of the Authority under Section 31 of the Goa Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the Act'). The complaint has been filed by Mr. Mohammed Farhan Memon against Gera Developers Pvt. Ltd. who is the promoter/developer in this case. As per complainant, the promoter i.e Gera Developers Pvt. Ltd. developed a project known as "GERA'S IMPERIUM PREMIO" which has been constructed in the property

bearing Survey No. 13/01-A (part) of the village Panelim, Tiswadi-Goa. The complainant (allottee) entered into two individual agreements dated 27/04/2018 (hereinafter referred to as 'the said agreements') with Gera Developments Private Limited for purchase of two restaurants bearing nos. 106 on the First Floor & Restaurant no. 6 situated on the ground floor of the building in the said project for a consideration amount of Rs. 1,33,05,584/- (Rupees One Crore thirty three lakhs five thousand five hundred and eighty four only) for each restaurant. This amount was to be paid by the complainant to the promoter as per the terms and payment schedule stipulated in schedule 5 of the agreements. The complainant made substantial payment in accordance with the terms of the agreements on time upon demand till 09/08/2019 and the balance payments as per schedule 5 of the agreements have remained outstanding since 5/2/2020 due to the fact that he has been in financial difficulties after the onset of Covid-19 pandemic. As per complainant, till date he has paid a sum of Rs. 1,40,65,324/- (Rupees One Crore Forty Lakhs Sixty five Thousand Three hundred and Twenty four only) as consideration amount towards both the restaurants bearing nos. 6 & 106 of the said building. However, the promoter has in his notice dated 10/06/2021 mentioned that complainant has till date paid a sum of Rs. 83,11,009/- (Rupees Eighty Three Lakhs Eleven Thousand and Nine only) with respect to restaurant no. 106 and a sum of Rs. 56,30,343/- (Rupees Fifty Six Lakhs Thirty

Thousand Three Hundred and Forty Three only) with respect to restaurant no. 6 which amounts total amount paid by complainant as Rs. 1,39,41,352/- (Rupees One Crore Thirty Nine Lakhs Forty One Thousand Three Hundred and Fifty Two only)

2. As per complainant, the promoter issued a notice of termination dated 16/03/2021 on account of delay in making the payments of each restaurant and thereafter promoter issued a letter dated 10/06/2021 invoking clause 36 of the said agreements which provides for the termination of the agreement. The complainant has contested the said termination as arbitrary. He has also challenged the validity of clause 36 of the said agreement for sale. He has requested to issue a direction to direct the developer to grant reasonable extension of at least 06 months to the complainant to make the payments which are due under the said agreements. Alternatively, he has requested for an order directing the developer/respondent to refund the amount of Rs. 1,40,65,324/- received by him from the complainant along with the interest @ 12% p.a.

3. The copy of the complaint was served to respondent by this office notice dated 13/01/2022 requiring him to give a written explanation on the said complaint within 10 days from the receipt of this notice. The respondent/promoter sought extension of time for filling the reply and finally filed the same by reply dated 02/05/2022 along with the

supporting documents. Subsequently, the promoter/respondent filed a counter claim dated 15/06/2022 and complainant filed reply of this counter claim dated 22/06/2022.

4. The promoter through two letters both dated 10/06/2021 both in respect of restaurant no. 6 and 106 invoked the clause 36 of the said agreements. It is mentioned in the letter in respect of restaurant no. 6 that against the total amount of Rs. 1,33,05,584/- complainant has paid an amount of Rs.56,30,343/- and in respect of restaurant no. 106, against 1,33,05,548/- complainant has paid the amount of Rs. 83,11,009/- both these amounts received by promoter are inclusive of GST i.e. Rs. 4,79,002/- and 3,19,335/- in case of both the restaurants respectively. Thus, as per promoter total amount received by him in respect of both the restaurants comes to Rs. 1,39,41,352/-. The complainant has submitted the reply dated 05/07/2021 addressed to the promoter. In this reply, complainant has not disputed this amount paid by him. Only in complaint dated 22/12/2021 filed before this Authority, he has stated that total amount paid by him Rs. 1,40,65,324/-. However, in support of his claim he has not produced any document nor he has explained in the reply. He has also not explained this figure at the time of arguments. Hence, for the purpose of this case, I take Rs. 1,39,41,352/- as correct amount paid by

complainant to the promoter incase of those two restaurants no. 6 and 106. Needless to say that this amount is inclusive of GST.

5. By the said letter of cancellation dated 10/06/2021, the promoter has mentioned that amount of GST, 10% forfeiture, interest charged and brokerage charged has been deducted from the amount received from the complainant. After deducting these amounts, the net amount which is to be refunded to the complainant comes to Rs. 12,28,786/- in respect of restaurant no. 6 and Rs. 49,08,177/- in respect of restaurant no. 106. Hence, promoter has proposed to refund amount of Rs. 61,36,963/- against the amount received by him of Rs. 1,39,41,352/- in respect of both the restaurants.
6. Both the parties were finally heard on 27/06/2022. The complainant has taken the plea that due to covid his financial position was shaken and he could not make the payment in time. Secondly, he has raised the issue of stringent provisions in the agreement of sale and stated that these provisions are against the Model Form of Agreement for sale prescribed under the Goa RERA Rules. Thirdly, under his reply/notice dated 05/07/2021 in para 6 complainant has also alleged that promoter also failed to complete the premises in time. According to him, in terms of Schedule 6 to the agreement, possession of the premises was to be handed

over to the complainant on or before June 2020, however, the premises were not ready for delivery of possession during this time.

7. In his reply dated 02/05/2022, respondent has narrated the payments made by the complainant and also default made by him in respect of various demand notices from the middle of 2019 onwards. According to respondent, they addressed several communications to the complainant to come forth and make the outstanding payment. However, he did not receive any response from the complainant. And then respondent addressed communications dated 10/03/2021 invoking clause 8 of the said agreements calling upon the complainant to make full payment immediately against the outstanding amounts. Despite receipts of the said notice, complainant failed to make the payments in terms of the said notice and as such after several other reminders and e-mails, the respondent was constrained to issue termination notice dated 06/10/2021 cancelling the said agreements.


8. In the first instance, I will like to discuss the claim of the complainant regarding cancellation of the said agreements. Complainant has taken the plea that letter dated 10/06/2021 was issued invoking clause 36 of the said agreements. Complainant has challenged the validity of clause 36 of the said agreements. Before examining the contents of the clause 36 of the said agreements, I will like to mention the provision related with the

cancellation of agreement. Section 11(5) of the Act deals with the cancellation of allotment which is as follows:

“(5) The promoter may cancel the allotment only in terms of the agreement for sale.”

Section 19(6) of the Act deals with the duties of allottees which is as follows:-

“(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.”




As per this para, allottee is duty bound to pay the installments as agreed in the agreement for sale. 5th Schedule of the said agreements describes the payment plan or payment schedule which has to be followed by allottee. This 5th schedule of the said agreements is similar to clause 1(c) of the Model Form of Agreement. In the circumstances, the payment schedule which is prescribed under the agreement for sale should have been followed by the allottee which he has failed to do. It is admitted position by the parties that allottee has stopped payment after August,

2019 and he has not responded to the notices sent by the promoter in this regard. Since allottee has defaulted in making payment, the promoter has exercised his power in cancelling the allotment for which he has been authorized under section 11(5) of the Act.

9. Now coming to refund of the amount paid by allottee to the promoter. As stated in para 5 of this order, the promoter has deducted considerable amount and as against the amount paid by allottee of Rs. 1,39,41,352/-. He has proposed to refund the amount of Rs. 61,36,963/-. The promoter has done this in terms of clause 36 of the agreement for sale. The allottee has challenged the validity of clause 36 of the said agreement for sale.

10. I have considered the claim of the rival parties in this regard. Section 13(2) of the Act provides that agreement for sale should be in the prescribed form, Section 13(2) is as follows:-



“(2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be

handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.”

Now in terms of the section 13(2), Government of Goa has made Rule 10 and under the Rule 10 Government of Goa has prescribed Model Form of Agreement for sale. Under this, modification in each case has been permitted but the same should be in accordance with the provisions of the Act. In short, Promoter cannot modify the agreement for sale beyond the scope of Act and Rules. If we go through the clause 36 of the agreement for sale dated 27/04/2018, it is found that conditions incorporated are one sided and not in accordance with the clause 4.2 of the Model Form of Agreement. This clause 36 consist of 10 sub clauses which have the conditions no where available under the Model Form of Agreement for sale. I will not like to do the detail analysis of entire clause and sub clauses contained under clause 36 but I can certainly say that these conditions are arbitrary and one sided. Sub-clause 3 of clause 36 of the said agreement for sale is as below:-

“Further, in the event of the price agreed to be received on such transfer/sale of the Unit in favor of a third party is less than the total price of the Unit specified above, and the termination is caused due to a breach of the Purchaser/Allottee or by the Purchaser/Allottee with no

fault of the Owner/Developer/Promoter, the Owner/Developer/ Promoter shall have the right to recover the differential amount from the Purchaser/Allottee, or adjust the same against the amounts refundable to the Purchaser/Allottee as above in the sub clause of this clause. However, in the event of the consideration to be received by the Owner/ Developer/Promoter on transfer/Sale of the Unit in favor of a third party is more than the consideration price of the unit charges to the Purchaser/Allottee, the Purchaser/Allottee shall not be entitled to stake any claim in respect of such excess consideration received by the owner/Developer/Promoter and the same shall belong to and be appropriated solely by the Owner/Developer/Promoter. Keeping this in mind, an amount equivalent to 10% of the purchase consideration agreed upon shall be retained by the owner/Developer/Promoter till the Unit is finally sold to another Purchaser/Allottee. The said retained amount shall be held without interest and shall be refunded within 8 days of the transfer/entering into any agreement with a new Purchaser/Allottee subject to deduction as aforesaid. In the event the new Purchaser/Allottee agrees to a figure larger than the consideration agreed upon, the entire retained amount as aforesaid shall be refunded within the said period of 8 days. If however no new Purchaser/Allottee is found within 180 days of the termination, and retention as aforesaid, the



Owner/Developer/Promoter shall refund the entire retained amount within 8 days thereof."

No where under the Act and Rules and Model Form of Agreement, such type of conditions have been prescribed. Under the circumstances, I hold the clause 36 of the agreement void ab-initio and deductions made under this clause as not proper. Though I maintain that promoter is authorized to cancel the agreement in terms of Section 11(5), 19(6) and violation of payment scheduled by allottee as per the provisions of agreement for sale contained in 5th schedule which is similar to the provision given under the Model Form of Agreement for sale, he is not entitled for any deductions under clause 36 of the said agreement for sale as it is found void.

11. Apart from irregularities in the agreement for sale dated 27/04/2018, I will like to mention that reference has come and position was admitted that promoter was unable to complete the construction as per the terms of agreement. Under the agreement, in 6th schedule it has been provided that promoter shall handover the possession of the premises on or before June, 2020. At the time of hearing, on inquiry, it was mentioned by the Ld. Advocate for respondent that possession of the premises are being given to various allottees now. That means there is delay in completion of construction and handing over of the premises by the respondent for

more than two years. Ld. Advocate for the respondent mentioned that respondent has taken extension from the authorities for completion of the project. I would like to mention that even if promoter has taken permission for extension of time to complete the project this will not hamper the rights of the allottees which is governed as per Section 18 of the Act. Under section 18, in case of delay in completion of project, rights of the allottees are protected. As per this section, if promoter fails to complete the project in terms of agreement for sale, allottee will be entitled for refund of the amount with interest. It has also provided under this section that if allottee does not intend to withdraw from the project, he shall be entitled for interest at prescribed rate for every month of delay. Both these provisions i.e. refund plus interest in case if withdrawal from the project and interest for every month of delay in case of continuing with the project has to be followed within the time limit provided under the agreement for sale. In this case, I will not like to award interest to the allottee as his withdrawal is due to default on his part also. Therefore, I feel that refund of entire amount received after deducting the GST will meet end of the justice. As mentioned earlier, amount received by promoter is Rs. 1,39,41,352/-. This amount includes the amount of GST which is Rs. 7,98,337/- (i.e Rs. 4,79,002 plus Rs.3,19,335/-) Hence, net amount refundable by promoter to the allottee will be Rs. 1,31,43,015/-.

12. As stated earlier and provided u/s 13(2) of the Act, the agreement for sale should be in the form prescribed by the Government under Rule 10 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, Model Form of Agreement for sale has been provided in annexure 'A'. The agreement for sale which is drafted by promoter should be as per the same Model Form of Agreement for sale. Though modification in each case has been permitted in this model agreement for sale, all those modifications should be within the purview of Act and Rules and Model Form of Agreement for sale. If we see the agreement for sale dated 27/04/2018 entered between the parties, it is found that the same is much variance to the Model Form of Agreement. Model Form of Agreement is an 18 page document where various conditions between promoter and allottee has been incorporated. The agreement for sale dated 27/04/2018 is containing 55 pages and densely written. From the size of the document itself one can infer that this document is more than 3 times bigger than the prescribed Model Form of Agreement for sale. Various new conditions have been imposed. A clause by clause analysis of the documents dated 27/04/2018 is not desirable. Clause 36 has already been analyzed in preceding paragraphs. Now I would like to mention clause 11.4 of the agreement for sale dated 27/04/2018 which deals with the delay in handing over possession.

13. For delay in completion of construction, certain reasonable extension of time has been provided under the Model Form of Agreement for sale. Provision of Clause 6 of the Model Form of Agreement provided such grounds which is as follows:-

“Provided that the promoter shall be entitled to reasonable extension of time for giving delivery of Apartment on the aforesaid date, if the completion of building in which the Apartment is to be situated is delayed on account of

- (i) war, civil commotion or act of God;*
- (ii) any notice, order, rule, notification of the Government and/or other public or competent authority/court.”*

Under clause 11.4 of the said agreements, Promoter has also provided circumstances for such extension but he has enlarged the scope. Clause 11.4 (c) of the sale agreement is as follows:-

“c. Provided further that the Owner/ Developer/Promoter shall be entitled to an automatic extension for a period of 6 months and such further reasonable extension of time for giving delivery of Unit on the aforesaid date, as may be granted by, on such terms and conditions and on payment of such fees as may be prescribed by, the concerned authorities, if the completion of building in which the Unit is to be situated is delayed on account of-



- 1) War, civil commotion
- 2) Act of God;
- 3) Any notice, order, rule, regulation, notification or directive of the Government and/or other local or public or private body or competent authority/court/tribal any quasi judicial body or authority;
- 4) Any prohibitory order of any court against the development of the building/land;
- 5) Flood, drought, cyclone, fire, earthquake, or any other calamity caused by the nature affecting the regular development of the real estate project;
- 6) Non-availability of cement, steel or other building material, water or electric supply/connection or drainage/sewerage connection or labors etc. ; or
- 7) Delay on account of the following:-
 - i. Minor or major Fire or explosion or accident at the site not caused due to any negligence by the Owner/ Developer/Promoter; or
 - ii. Strikes or agitation by the workers, employees or laborers of the Owner/Developer/Promoter or the contractors or suppliers or
 - iii. Government seizures of the equipment and/or plant of the building
 - iv. Any judgment of a competent court or any legislation or regulation or statutory or regulatory change of a governmental entity



prohibiting the performance of this Agreement;

- v. Delay in issue of the occupation certificate and/or grant of any no objection certificate, permission, approval, sanction, license and/or order as may be required in respect of the said Unit for reasons not attributable to the Owner/ Developer/Promoter.
- vi. Act of interference or action by civil or military authorities, act of terrorism, or act of a public enemy, acts of belligerents or foreign enemies, riots, blockages, civil disturbances, revolution, rebellion or insurrection, exercise of military or usurped power.”

14. A plain reading of the provisions contained in Model Form of Agreement vis-a-vis clause 11.4 (c) of the said agreements will establish that promoter in the said agreement has widened the scope of grounds for extension of time. I would like to mention that time is essence for the promoter and allottee. By providing liberal terms for availing the extension of time, promoter has virtually violated the spirit of Act, Rules and Model form of Agreement.

15. From the observations in the preceding paragraphs, it is established that promoter has not executed the agreement with allottee as per Model Form of Agreement for sale incorporated under the Goa Rules. He has

executed the agreement drafted by him which is against the provisions of Act, Rules and Model Form of Agreement. Penalty for contravention of the provisions of act other than Section 4 has been provided under Section 61 of the Act. The Section 61 of the Act is as follows:-

“61. Penalty for contravention of other provisions of this Act.- If any promoter contravenes any other provisions of this 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 up to five percent. of the estimated cost of the real estate project as determined by the Authority.”

Since promoter has violated the provisions of the Act i.e. Section 13(2) of the act, he is liable for penalty u/s 61 of the Act. As mentioned in the Section 61, penalty may extend upto 5% of the estimated cost of the project. However, considering the facts and circumstances of the case and extent of violation, I feel the penalty of Rs. 10,00,000/- (Rupees Ten Lakhs only) will meet the end of justice.

16. In view of the observation above, the following directions are issued:-

1. Respondent/ promoter is hereby directed to refund the amount of Rs.1,31,43,015/- (Rupees One Crore Thirty One Lakhs Forty Three Thousand and Fifteen only) to the allottee i.e. complainant as per

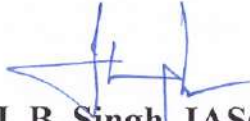
para 11 of this order. After refund, the said Agreement shall be deemed as cancelled.

2. Respondent/promoter is directed to pay the penalty of Rs. 10,00,000/- (Rupees Ten Lakhs only) as per Section 61 of the Act.

The promoter shall pay the above mentioned refund and penalty within Thirty days (30 days) after receipt of this order failing which he will be liable to pay the interest as per highest marginal cost of lending rate plus 2% fixed by SBI i.e. (7.5% + 2% =9.5%) after the expiry of 30 days and till the entire amount paid by the promoter or recovered from him under the law.

3. Complaint dated 22/12/2021 made by the complainant and counter claim dated 15/06/2022 made by the respondent are disposed of.

Order accordingly,


J. B. Singh, IAS(Retd.)
Member, Goa RERA

To,

1.Mohammed Farah Memon

H.No. 316 C near Hari Mandir,
Malbhat, Margao South-Goa, 403601.

2.Gera Development Private Limited

Office at 200 Gera Plaza
Boat Club Road,
Pune Maharashtra, 411001.