



GOA REAL ESTATE REGULATORY AUTHORITY

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F.No:4/RERA/Adj. Matters (83)/2022 /680

Date: 14/07/2023

BEFORE THE ADJUDICATING OFFICER

Mr. Santosh Krishna Prabhugaonkar,

House no. 540, Kolsar, Loliem,

Canacona Goa-403702.

.....Applicant/Complainant

Versus

1.M/s M. S. Builders and Developers,

Represented by its Managing Partner's,

Mr. Vithal Mohan Miringkar & Mr. Sadanand Govind Gaude,

Having Business office at office no. 18, First floor,

Ponda Commerce Centre,

Ponda-Goa, 403401.

.....Respondent No. 1

2. Mrs. Sandhya Sadanand Gaude,

Represented by her constituted power of attorney holder,

Shri Sadanand Govind Gaude,

Both residents of H.No. 139,

Borim, Ponda Goa, 403401.

.....Respondent No. 2

3. Mrs. Savita Vithal Miringkar,

Represented by her constituted power of attorney holder,

Shri Vithal Mohan Miringkar,

Both residents of H.No. 1372,

Chikangal, Shiroda, Ponda, Goa, 403401.

.....Respondent no. 3

4. Mr. Narendra Gopinath Gaonkar,

Resident of Flat no. F-5,
Shri Kulswamini, Deulwada,
Borim, Ponda, 403401.

.....Respondent no. 4

Ld. Advocate Shri V. Naik for the Applicant/ Complainant.

Ld. Advocate Shri V. Deulker for the Respondents 1 to 3.

Case proceeds ex-parte against Respondent no. 4.

ORDER

(Delivered on this 14th day of the month of July, 2023)

The present proceedings have arisen as a corollary to the complaint under Section 31 of The Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the RERA Act') filed by the applicant/ complainant against the respondents bearing complaint no. 3/RERA/ Compt.(308)/2022.

2. The above said complaint was disposed off in favour of the applicant/ complainant vide Order dated 03.11.2022 of the Goa Real Estate Regulatory Authority (for short Goa RERA). The said Authority directed as under:-

“a) The sale of open area admeasuring 45 sq. mtrs. by promoter to the respondent is declared as illegal and respondent is hereby directed to take possession of the area and remove the structure on this open space within 45 days.

b) For the purpose of determination of compensation, the case is referred to Adjudicating Officer under Section 71 of the Act.”

3. Thereafter the said matter came before this Forum under Section 71 of the RERA Act.
4. The applicant/ complainant filed his claim for compensation in Form 'B'.
5. Briefly stated the facts of the applicant / complainant is that he is the purchaser and the allottee of flat no. F-1 admeasuring 93.93 sq. mtrs. situated on the first floor of the building 'Kulswamini', hereinafter referred to as "the said flat", from M/s Builders, a partnership firm by a sale deed dated 01.10.2020 duly executed and registered on 06.10.2020.
6. The said building was duly approved by the Town and Country Planning Department of Ponda, Goa. The said building is also registered under the RERA Act.
7. The said flat is located on the North-West corner of the building and towards the southern side of the said flat lies an open ventilation cut out area or a small open space admeasuring 45 sq. mtrs which is vertically open to the sky above which area abuts to the staircase for the use of the inhabitants.
8. The said area of 45 sq. mtrs. is located in between the said flat and flat no. F-5.
9. The said open area is basically meant for the purpose of ventilation, retention of free sunlight, installation of central services such as electricity, water sanitation, air conditioning, fire safety measures and also as a portion of the project for the safety and convenience of the allottees for maintenance.

10. Taking advantage of the absence of the applicant/ complainant, the said open area was altered and modified by installing marine ply sheets and by covering the top roof which has resulted in blockage of the free flow of air necessary for ventilation and sunlight passing. Thereby violating the basic easementary rights as promised in the sale deed dated 01.10.2020.
11. Upon enquiry the applicant/ complainant learnt that the respondents 1 to 3 had sold the said open space as an additional area in favour of respondent no. 4 by sale deed dated 30.11.2022 along with the sale of flat no. F-5.
12. The respondents have thus acted in clear violation of Section 14 of the RERA Act as the said open space have been illegally sold and allowed to be altered and modified in complete contravention of the sanctioned plans.
13. It is also contended that the respondents have failed to provide a lift has shown in the plans for which provision has been kept. The respondents have also failed to form society/ association of members within 03 months as mandated under Section 11(4) (e) of the RERA Act.
14. The applicant/ complainant is therefore entitled for compensation of Rs. 5,00,000/- (Rupees Five Lakhs only) towards mental agony, harassment and hardship caused to the applicant/ complainant on account of such default. The applicant/ complainant is also entitled to legal expenses incurred to the tune of Rs. 1,00,000/- (Rupees One Lakh only).

15. The respondents 1 to 3 were duly served. The Registered A.D. notice addressed to respondent no. 4 was returned with endorsement 'left return to sender'. A fresh notice was issued to respondent no. 4 in electronic form by way of whatsapp message which was duly received by the respondent no.4 showing blue ticks. Despite receipt of the said notice the respondent no. 4 failed to appear and the matter was ordered to proceed ex-parte against the respondent no. 4.
16. The respondent no. 1, 2 and 3 filed their reply resisting the claim for compensation filed by the applicant/ complainant. The respondents 1 to 3 have raised preliminary objections that the claim is not maintainable and is barred by the principle of res-judicata. The respondents 1 to 3 submitted that they requested the respondent no. 4 to undo the things done by him without the permission or consent of the respondents 1 to 3. Upon receipt of the notice dated 13.11.2021 the respondents no. 1 to 3 served written request dated 13.04.2022 to the respondent no.4 to remove the obstructions and additional work carried out within 08 days.
17. The respondents 1 to 3 have denied the case as set out in the claim for compensation and have submitted that they have already complied with the said order dated 03.11.2022 and submitted report to the Hon'ble Authority.
18. Affidavits in evidence have been filed by the applicant/ complainant and respondents 1 to 3. Oral arguments have been advanced by Ld. Advocate V.

Naik for the applicant/ complainant. Written arguments have been filed by Ld. Advocate V. Deulkar for the respondents 1 to 3.

19. The point for determination and my finding to the same is as under:-

Point for determination	Finding
<i>Whether the respondents are liable to pay compensation to the applicant/ complainant?</i>	<i>Partly in the affirmative as per order.</i>

REASONS

20. Ld. Advocate Shri V. Naik for the applicant/ complainant submitted that the said open space or ventilation cut out area provided to the building is basically meant for the purpose of ventilation, retention of free sunlight, for installation of central services such as electricity, water sanitation, air conditioning, fire safety measures necessary for the safety and convenience of the allottees for maintenance.
21. Ld. Advocate Shri V. Naik submitted that as a result of the unauthorized modifications and alterations in the portion which forms a part of the common area provided for common use as indicated in the approved plans has resulted in the blockage of the free flow of air necessary for ventilation and sunlight passing or flowing directly through such open ventilation thereby violating the basic elementary rights as promised by the respondents 1 to 3 in the sale deed dated 01.10.2020 executed with the applicant/ complainant.

22. Ld. Advocate Shri V. Naik submitted that upon obtaining the certified copy of sale deed dated 30.11.2020 executed by the respondents 1 to 3 with the respondent no. 4 whereby flat no. F-5 was sold to respondent no. 4, it is evident that the respondents 1 to 3 have illegally sold the open space admeasuring 45 sq. mtrs. to the respondent no. 4 which is ex-facie illegal and a blatant violation of the provisions of RERA Act.
23. Ld. Advocate Shri V. Naik further submitted that based upon the said sale deed dated 30.11.2020 the respondent no. 4 has illegally encroached in the open area by putting marine ply sheets therein.
24. Ld. Advocate Shri V. Naik submitted that the acts committed by the respondents prove that the respondents 1 to 3 as promoter by illegally selling the said open space to the respondent no. 4 which otherwise forms part of common area have wilfully committed default in complying with the mandate of Section 12, 14 and 19 of the RERA Act and therefore is liable pay the applicant/ complainant compensation on account of such default.
25. The respondents 1 to 3 in the reply as well as in the written arguments have denied the case of the applicant/ complainant. It is their case that the present complaint is barred by the principle of res-judicata as the issues raised in the present case are already adjudicated and the Order dated 03.11.2022 of the Regulatory Authority is already complied by the respondents 1 to 3 who have submitted the report of the compliance before the Hon'ble Authority.

26. It is the case of the respondents 1 to 3 that upon receipt of the legal notice dated 13.11.2021, the respondents 1 to 3 served a written request dated 13.04.2022 to the respondent no. 4 to remove the said additional work carried out by him within 08 days and as such the applicant/ complainant is not entitled to any compensation against the respondents 1 to 3.
27. The respondent no. 4 though duly served in both the earlier complaint before the Regulatory Authority as well as in the present case of compensation before this Forum has deliberately chosen to remain absent. Both the complaint as well as the present case for compensation have thus proceeded ex parte against the respondent no. 4.
28. The respondents 1 to 3 have admitted that upon receipt of legal notice dated 13.11.2021, they have served a written request to the respondent no. 4 to remove within eight days the said additional works carried out by him covering the open space of 45 sq. mtrs. with grills and having covered the same internally with aluminium fabrication and sliding glass doors thereby infringing the right of the adjoining flat owners right to light and air.
29. It is not in dispute that the respondent no. 4 has failed to comply with the said written request made by the respondents 1 to 3.
30. It is also not in dispute that even after the order dated 03.11.2022 passed by the Regulatory Authority declaring the sale of the open area admeasuring 45 sq.

mtrs. by the respondents 1 to 3 to the respondent no. 4 as illegal and directing the respondents 1 to 3 to take possession of the area and remove the structure on this open space within 45 days, the same has not been complied with by the respondents 1 to 3 as well as the respondent no. 4 till date.

31. It is open to the applicant/ complainant to pursue the matter for execution of the said order dated 03.11.2022 passed by the Regulatory Authority and obtain redressal of his grievances.
32. The wilful default on the part of the all the respondents in complying with the said order dated 03.11.2022 has resulted into unwarranted hardship, stress and mental agony to the applicant/ complainant both financially and mentally including incurring of legal expenses in filing the complaint before the Regulatory Authority as well as the present claim for compensation before this Forum.
33. Section 18(3) of the RERA Act deals with the return of amount and compensation. Sub-Section (3) of Section 18 provides that 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.

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

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

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused as a result of the default;

(c) the repetitive nature of the default;

(d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.”

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

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

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and,

therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

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

36. Taking into consideration the claim of the applicant/ complainant on the ground of unwarranted hardship, stress and mental agony caused to the applicant/ complainant on account of the wilful default of the respondents despite the said order dated 03.11.2022 passed by the Regulatory Authority, which has not been challenged till date by any of the respondents, the applicant/ complainant would be entitled to be paid compensation by the respondents which can be reasonably assessed at ₹2,00,000/- (Rupees Two Lakhs only).
37. Admittedly, the applicant/ complainant was required to file the complaint before the Regulatory Authority and the present claim for compensation for which the applicant/ complainant had to deposit a sum of ₹5,000/- (Rupees Five Thousand only) before the said Authority and has also to pay unwarranted litigation costs, lawyer's fees for conducting both the matter before the Regulatory Authority

and this Forum. The applicant/ complainant has claimed a sum of ₹1,00,000/- (Rupees One Lakh only) for the same. To my mind towards financial losses sustained on this count, the applicant/ complainant would be entitled to compensation of ₹50,000/- (Rupees Fifty Thousand only) by the respondents. The point for determination, is therefore, answered partly in the affirmative.

38. As per Rule 18 of The Goa Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of interest and Disclosures on Website) Rules, 2017 the rate of interest payable by the promoter and the allottee shall be the State Bank of India highest Marginal Cost of Lending Rate plus two percent. At present, such lending rate of interest is 8.70 per annum. Hence, the respondents are jointly and severally liable to pay interest at the rate of 10.70% p.a. for every month of delay to the applicant/ complainant on the aforesaid total amount of ₹2,50,000/- (Rupees Two Lakhs Fifty Thousand only).

39. Before parting with this order, it is necessary to mention that the applicant/ complainant filed his claim for compensation in Form 'B' on 23.02.2023. The respondents 1 to 3 were duly served and filed their reply after seeking time twice on 11.04.2023. The registered A.D. notice to respondent no. 4 was returned with remark 'left return to sender'. Thereafter respondent no. 4 was duly served electronically despite which respondent no. 4 remained absent. The case against respondent no. 4 was ordered to proceed ex-parte. On 10.05.2023


affidavit in evidence was filed by the applicant/ complainant. On 17.05.2023 affidavit in evidence and written arguments were filed by the respondents 1 to 3. On 05.06.2023 oral arguments of the applicant/ complainant were partly heard. An opportunity was given for settlement at the instance of respondents 1, 2 and 3. However, as no settlement could take place, further oral arguments of the applicant/ complainant were heard on 26.06.2023. The matter now stands disposed off on 14.07.2023.

In the result, I pass the following:-

ORDER

The respondents jointly and severally are directed to pay the applicant/ complainant compensation of ₹2,50,000/- (Rupees Two Lakhs Fifty Thousand only) for violations under Section 18(3) read with Section 71 and 72 of the Real Estate (Regulation and Development) Act, 2016 within 30 (thirty) days of this Order.

In default, the respondents jointly and severally shall be further liable to pay the applicant/ complainant interest on the said amount of ₹2,50,000/- (Rupees Two Lakhs Fifty Thousand only) @ 10.70% p.a. till the date of payment/ realisation.


14/07/2023
(Ashley L.C. Noronha)
Adjudicating Officer,
Goa RERA