



GOA REAL ESTATE REGULATORY AUTHORITY

DEPARTMENT OF URBAN DEVELOPMENT

GOVERNMENT OF GOA

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No.3/RERA/Complaint(105)/2019/179

Date: 01/04/2021

Alex D'Souza, major married
r/o Landmark Elite Residency,
Flat FTI Duler,
Mapusa, Goa
Vs.

..... Complainant

(1) Mohan Bagade, major,
R/o Flat No.1, Ground Floor,
Virginkar Classic,
Near Maruthi Mandir,
Margao, Goa.

(2) Smt. Xaverina Costa E. Fernandes,
Major, Married d/o Antonio Fernandes,
r/o 179/C, Pavasao, Macasana,
Salcete-Goa.

(3) M/s Damodar Enterprises, a sole
Proprietorship Firm represented by
its sole proprietor Shri Mohan Bagade,
son of Raghunath Bagade, major,
married r/o Flat No.1,
Ground Floor, Virginkar Classic,
Near Maruthi Mandir,
Margao, Salcete-Goa.

..... Respondents

ORDER

Dated: 01/04/2021

This order disposes of the Complaint received online on 11/12/2019 against the respondent No.1 in respect of the project "SEBS HEIGHTS", to be constructed in the property bearing survey No.110/5 of village Nagorcem Canacona, Goa whereas Smt.Xaverina Costa E. Fernandes and M/s Damodar Enterprises were added as respondents later on.

- 2) In the Complaint, the Complainant has mentioned as follows:-
“Flat was purchased and registered in Canacona Sub-Registrar in 2014 with a commitment to deliver the flat by 2016. Until date the project has not been completed and the builder is not giving us possession of the said flat and is refusing to give us our flat nor is he refunding the money. The property has been given to another party for construction who are denying to give us our flat.”

The relief sought from this Authority by the Complainant is refund of full payment plus expenses and interest.

- 3) Notices were issued to both the parties, who put up their appearances before the Authority. Reply was filed by the respondent No.1 and the same was adopted by the other respondents. In the reply, the respondent submitted that the Real Estate (Regulation and Development) Act, 2016, hereinafter mentioned as RERA Act does not apply to the present case as the respondent was no longer a promoter of the subject matter property on 24/11/2017 when RERA Act was made applicable to the State of Goa. According to the respondent, he was to construct a building in the plot B admeasuring 500.00 sq.mts of survey No. 110/5 of Village Nagorcem, Canacona, Goa in pursuance to the Agreement for Sale and Development dated 12/10/2012 executed with the Land Owners and in furtherance thereto, Agreement for construction cum sale dated 20/01/2014 was executed with the Complainant, however by judgment dated 05/05/2017 passed by Civil Judge, Junior Division, Canacona in RCS 35/2016, the agreement dated 12/10/2012 executed between the Respondent and the Land Owners was declared Null and Void. According to the respondent, since the authority to deal with the said Plot B or develop the said plot was taken away from the respondent by the aforesaid judgment dated 05/05/2017, the respondent was no longer the promoter of the land on 24/11/2017 i.e. the date on which the Real Estate (Regulation and Development) Act, 2016 was made applicable to the State of Goa.
- 4) The respondent further submitted that because of the aforesaid reasons, the project was not an ‘ongoing project’ as on the aforesaid date of RERA coming into force in the State of Goa and hence RERA is not applicable to the present case. The respondent referred to the definition of “ongoing project” as given in RERA, 2016 applicable to the States of Andhra Pradesh,

Chattisgarh, Mizoram, Punjab, Tamilnadu, Telangana, UP (since the term “ongoing Project is not defined under Goa Rera 2016) as follows:-

“ongoing Project” means, a Project where development is going on and for which Occupancy Certificate or Completion Certificate has not been issued...”

According to the respondent, the basic criteria for applicability of RERA in respect of project commenced prior to coming into force of RERA is that the development should be going on as on the date of coming into force of RERA but in the instant case, construction of the project in question was abandoned long back before RERA came into force in Goa and even the construction license of the project had expired on 20/12/2015 and no renewal was made thereafter. Thus, according to the respondent, the project in question was not on ‘ongoing project’ within the purview of RERA and therefore, RERA is not applicable to the instant case. The respondent reiterated that RERA was not made applicable to projects which were stopped/abandoned prior to coming into force of RERA but to only those projects which would be floated after 24/11/2017 or to ongoing projects as on 24/11/2017 and which had not obtained Completion Certificate.

- 5) The respondent further submitted that the Complainant has approached this forum with unclean hands and by making false declarations. The respondent denies that the Complainant has made payment of a sum of Rupees Nineteen lakhs to the respondent. The respondent also pointed out that the Complainant has also filed complaint registered as Complaint No.7/2020 before Consumer (Redressal District Forum at South Goa, Margao and the same is pending. Thus the respondent prayed to dismiss the Complaint.
- 6) Complainant filed affidavit wherein he stated interalia that by virtue of an “Agreement for Sale without Possession” dated 20/01/2014 executed by and between Mr.Xaverina Costa e Fernandes and M/s Damodar Enterprises of One Part and the Complainant, Mr.Alex Cajetan D’Souza and his wife Mrs.Nicole D’Souza of Second Part, it was agreed by the Respondent to construct and sell an apartment to the Complainant and his wife and it was agreed by the Complainant to finance the construction of a flat bearing No.4FF admeasuring 49 sq.mts on the first floor in the Project:SEBS HEIGHTS” to be constructed in the Village of Nagorcem-Palolem, Canacona, Goa in Plot B of property bearing survey No.110/5 and purchase the same along with proportionate share in the land.

- 7) It is submitted by the Complainant that the total consideration price of the said premises was Rupees thirteen lakhs and the said amount was paid from the account of the wife of the Complainant and in addition to the same, the Complainant paid the respondents Rupees six lakhs towards interiors and therefore the respondents received Rupees nineteen lakhs from the Complainant.
- 8) The Complainant further submitted that as per clause 9 of the said agreement, it was incumbent upon the respondent to hand over possession of the said apartment ready in all respects within a period of 18 months from the date of execution of the said agreement and the said period of 18 months expired on 19/07/2015. It is further stated that after the expiry of the said period of 18 months the Complainant requested the respondent many times to complete the project and hand over the same to the Complainant but as the respondent failed and neglected to do the same, a legal notice dated 23rd September, 2017 was issued to the respondent calling upon the respondent to discharge his obligation and hand over the possession of the said premises after completing the same but no reply was given by the respondent to the said notice.
- 9) The Complainant relied upon the said "Agreement for Sale without possession dated 20/01/2014"; Receipt issued by M/s Damodar Enterprises and the legal notice dated 23/09/2017 and prayed this Authority to direct the respondent to pay to the Complainant a sum of Rupees nineteen lakhs along with interest @ 18% p.a. towards mental torture, agony and hardship; to pay fine and interest of Rupees one lakh and cost of Rs.50,000/- to the Complainant.
- 10) Affidavit is also filed by the respondents wherein it is interalia submitted that the respondent was to construct the building in the Plot B admeasuring 500.00 sq. metres of survey No.110/5 of village Nagorcem, Canacona, Goa pursuant to the Agreement for Sale and Development dated 12/10/2012 executed with the land owners and in furtherance thereto Agreement for construction cum sale dated 20/01/2014 was executed with the Complainant, however, vide judgment dated 5/5/2017 passed by Civil Judge, Junior Division, Canacona in RCS 35/2016, the said Agreement dated 12/10/2012 executed between the Respondent and the Land Owners is declared null and void and as such the authority of the respondent to deal with the said Plot B

or develop the said plot after 5/5/2017 was taken away by the order of the Civil Court and thus, the respondent was no longer the promoter of the said land.

- 11) The respondent has submitted that the Real Estate (Regulation and Development) Act, 2016 was made applicable to the State of Goa w.e.f. 24/11/2017 while the authority of the respondent to develop the plot B was cancelled by Civil Court on 5/5/2017 and therefore, the Project was not an "Ongoing Project" as on the date of RERA coming into force in State of Goa and hence RERA is not applicable to the case in hand. According to the respondent the term "Ongoing Project" is not defined under Goa RERA 2016 and thus a reference will have to be made to the definition in Acts in Pari Materia i.e as applicable to the State of Andhra Pradesh, Chattisgarh, Mizoram, Punjab, Tamilnadu, Telangana, U.P. which define "ongoing Project" as "a Project where development is going on and for which occupancy Certificate or Completion Certificate has not been issued.....". Thus, according to the respondent the basic criteria for applicability of RERA in respect of Project commenced prior to coming into force of RERA is that development should be going on as on the date of coming into force of RERA, which is not the case here. The respondent has submitted that the construction of the Project under complaint was abandoned long back before RERA came into force in Goa, as the Construction License of the said project expired on 20/12/2015 and no renewal was made thereafter. According to the respondent, RERA was not made applicable to projects which were stopped/abandoned prior to coming into force of RERA but to only those projects which would be floated after 24/11/2017 or to ongoing project as on 24/11/2017 without Completion Certificate. Thus, according to the respondent, this Authority lacks jurisdiction to adjudicate the present complaint.
- 12) The respondent denied having received from the complainant a sum of Rupees nineteen lakhs. It is stated that the Complainant failed to prove the source of payment vis-à-vis the terms of provisions of Foreign Exchange Management Act and the payment, if any, is in violation of FEMA rendering the payment and purchase agreement void. The respondent further pointed out that the Complainant has also filed complaint registered as Complaint No.7/2020 before Consumer Redressal District Forum at South Goa,

Margao, which is pending. The respondents therefore, prayed this Authority to dismiss the complaint.

13) Written submission were filed by both the Parties. Oral arguments heard.

The points for my determination in the instant case are as follows:-

<u>Points for determination</u>	<u>Findings</u>
(1) Whether this Authority has jurisdiction to decide the instant Complaint.	In the negative
(2) Whether the Complainant is entitled for the refund of Rupees nineteen lakhs along with interest, compensation and costs as prayed	The Authority lacks jurisdiction and hence instant point not decided.

Reasons

Point No.1 – The legal relationship between the Complainant and the respondents accrued by virtue of “Agreement for Sale without possession” dated 20/01/2014. The aforesaid Agreement related to the property named “Paico Sanvorialem” denominated as “Gharbhat” situated at Bhikarwada, Nagorcem at Canacona Taluka bearing survey No.110/5 of Village Nagorcem having an area of 3900 sq.mts out of which property, 500 sq.mts identified as Plot B was the subject matter of agreement for sale and development dated 12/10/2012 entered into between the Builder/Developer/the respondent herein with the landowners. The Developer undertook the development and/or construction in the said property consisting of multi storeyed building constructions thereon and also to enter into agreements for the sale/transfer of the constructions thereon and undivided rights of the said property to the prospective Finance/Purchaser.

14) Pursuant to the aforesaid agreement dated 12/10/2012, the Developer entered into an “Agreement for Sale without possession” dated 20/01/2014 with the Complainant herein and his wife and as per the said duly registered agreement, the Developer agreed to construct a flat No.4ff admeasuring 49 sq.mts. on the first floor of the Building “SEBS HEIGHTS” on the said property bearing survey No.110/5 of village Nagorcem, Canacona Taluka and the Complainant along with his wife agreed to finance a sum of Rupees thirteen lakhs for the construction of the said premises. As per the said agreement, the financier/purchaser had paid the Developer a sum of Rupees

thirteen lakhs for the said flat and the corresponding proportionate floor area/undivided share in the said property. It is specifically provided in clause 9 of the Agreement that the Developer shall complete the construction of the said premises and ensure that the said premise is ready for occupation within a period of 18 months from the date of execution of the said agreement. Thus the said period of 18 months expired on 19/07/2015 but the fact remains that till date the said premises is not completed by the Developer.

- 15) RERA Act 2016 was made applicable in Goa on 24/11/2017 on which date 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 and other Rules were framed by State of Goa. Thus the main issue in the instant case is whether the “Builder/Developer” of the said agreement dated 20/01/2014 or in other words the respondents herein were still the “promoters” of the said project as on 24/11/2017 or whether the said project, which is the subject matter of the instant complaint was an “ongoing Project” without Completion Certificate as on 24/11/2017.
- 16) It is seen that a civil suit bearing RCS No.35/2016 was filed by 13 plaintiffs against the respondents herein before the Ld. Civil Judge, Junior Division, Canacona to declare the agreement dated 12/10/2012 executed between the plaintiffs and the defendants/the respondents herein for development of part of the property/suit property admeasuring 500 sq.mts shown as Plot B in the agreement as null and void. The said relief along with compensation was prayed by the plaintiffs on the ground that the defendants/the respondents herein failed to complete the construction of the building as required under the said agreement, inspite of several requests and legal notice. The defendants/the respondents herein did not appear before the trial court and they were set exparte and exparte judgment dated 05/05/2017 was passed wherein it was interalia declared that the agreement dated 12/10/2012, duly registered before the Sub-Registrar, Canacona is null and void.
- 17) Since the agreement dated 12/10/2012 between the plaintiffs and the defendants/the respondents herein was declared as null and void by the civil court by judgment dated 05/05/2017, the respondents herein had no authority, right or power to deal with and do construction in the plot which is the subject matter of the complaint, on or after the said date 05/05/2017. As a consequence thereof, by the force and consequential impact and bearing of

the said judgment dated 05/05/2017 the “agreement for sale without possession” dated 20/01/2014 between the complainant along with his wife and the respondents herein became unenforceable in law since the respondents were no longer the promoters/Developers/Builders on and after 05/05/2017. Thus, as on 24/11/2017, when RERA Act was made applicable to Goa by framing of Rules, the respondents were no longer the Promoters of the said Project. The project was no longer an “ongoing Project” without Completion Certificate as on 24/11/2017 since from 05/05/2017 onwards the respondents had no authority or right to do any construction over the said land which is the subject matter of the present Complaint.

In the nut shell, since the respondents were neither the Promoters in the eyes of law as on 24/11/2017 nor the project in question was the “ongoing project” without Completion Certificate as on 24/11/2017, RERA Act 2016 when applicable to Goa was not applicable to the instant case.

- 18) The Ld.Advocate for the Complainant has argued that the respondents have not terminated/cancelled the agreement dated 20/01/2014 executed with the Complainant and his wife and therefore the said agreement is still subsisting. It is further argued that section 18 of Goa RERA Act is attracted in the instant case. Section 18 is reproduced hereunder for ready reference.

“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:

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

According to the Ld. Advocate of the complaint, if the developer has failed to complete or is unable to give possession of an apartment, plot or building due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any reason, the allottees are entitled for refund of their amount along with interest and compensation and has argued that thus for whatsoever reason, if the respondents failed to complete the project and give possession of the same to the Complainant, then the respondents are liable for refund of the amount with other consequential liabilities, as per section 18 of the Act.

19) Section 1(2) of RERA Act states that it shall extend to the whole of India except the State of Jammu and Kashmir and Sub Section (3) states that it shall come into force on such date as the Central Government may, by Notification in the Official Gazette appoint, “Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.”

The Goa Real Estate Rules, 2017, which came into effect on 24/11/2017 defined “Authority” as “Goa Real Estate Regulatory Authority established under sub-section (1) of Section 20”. Thus Goa Real Estate Regulatory Authority came into picture from 24/11/2017 onwards. The said Goa Rules inter alia mentioned about additional

information to be furnished by the promoter to the “Authority” for registration of Real Estate Project; various disclosures to be made by the Promoter before Goa Real Estate Regulatory Authority regarding ongoing projects and other mandatory provisions. The Complainant has given emphasis to Section 18 of RERA Act and states that in the instant case the same is attracted, however, as Section 18 of the Act mentions not only of the refund but also of interest ‘as may be prescribed in this behalf’ meaning thereby as prescribed under the Rules, one has to fall back upon the Rules, which as stated earlier came into force in Goa on 24/11/2017. Under Chapter IV, Section 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 Allottee shall be the State Bank of India highest marginal cost of lending Rate plus two percent”. Even the manner of recovery of interest, penalty and compensation; manner of enforcement of the order, direction or decision of the Adjudicating Officer or Authority; terms and conditions and the fine payable for compounding of offence; manner of filing a complaint with the Authority and the manner of holding an inquiry by the Authority, etc. were all laid down in the aforesaid Rules of 24/11/2017. Thus the date for deciding the instant complaint is 24/11/2017, when Rules were framed in Goa.

- 20) Thus, as the said “Agreement for Sale without possession” dated 20/01/2014 was no longer legally enforceable and therefore became invalid in the eyes of law, though not formally terminated by the parties, before 24/11/2017 when RERA Act was made applicable to Goa by framing its Rules, as the respondents were no longer the “Builder/Developer”/Promoters prior to the said date 24/11/2017 and as the project in question was no longer the “Ongoing project” before 24/11/2017, because of the judgment dated 05/05/2017 passed by the Civil Court, the said Act does not apply to the instant case and hence Section 18 of RERA Act is not attracted in the instant case and therefore, this Authority lacks jurisdiction to decide the present complaint.

Point No.2

21) Since this Authority lacks jurisdiction to decide the instant case, the instant point is not decided.

In view of the aforesaid, the instant complaint is dismissed.

Vijaya D. Pol
11/9/2021
(Vijaya D. Pol)
Member, Goa RERA

**To,
All Concerned.**