

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 05.02.2019
Complaint No.	713/2018 Case titled as Rosemary Hospitality Private Limited V/S Anjali Promoters & Developers Pvt. Ltd & Anr
Complainant	Rosemary Hospitality Private Limited
Represented through	Shri Sumit Mehta Advocate for the complainant
Respondent	M/S. Anjali Promoters & Developers Pvt. Ltd & Anr
Respondent Represented through	Shri Shashank Bhushan Advocate for the respondent
Last date of hearing	First hearing
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation & Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

Occupation certificate has been received by the respondent on 9.10.2018. Respondent has offered the possession of the unit to the complainant on 26.11.2018.

Arguments heard.

As per clause 2.1 of the Space Buyer Agreement dated 13.12.2008 for unit No.08-804, in project "Centra One" Sector-61, Gurugram, possession was to be handed over to the complainant by **31.12.2011**. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.64,16,893/- to the respondent against a total sale consideration of Rs.68,42,963/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 31.12.2011 till 26.11.2018, as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

The final give/take may be made after adjusting the dues from the buyer/complainant within 30 days of receipt of offer letter. Both the parties are directed to get the conveyance deed executed within a period of 30 days.

Complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)
5.2.2019

Subhash Chander Kush
(Member)

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 713 of 2018
First date of hearing : 5.2.2019
Date of decision : 5.2.2019

Rosemary Hospitality Pvt. Ltd.
Address: M-3/60, Ground Floor, DLF City,
Phase-II, Gurugram, Haryana

Complainant

Versus

1. Anjali Promoters and Developers Pvt.
Ltd.
Office: 7, Barakhamba Road, New Delhi –
110001
2. BPTP Ltd.
Office: M-11, Middle Circle, Connaught
Circus, New Delhi – 110001

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sumit Mehta Advocate for the complainants
Shri Shashank Bhushan Advocate for the respondent

ORDER

1. A complaint dated 28.9.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) rules, 2017 by the complainant Rosemary Hospitality Pvt. Ltd. against Anjali Promoters Pvt. Ltd. and



BPTP Ltd. in respect of apartment/unit described below in the project 'Centra One', on account of violation of the section 11(4)(a) of the Act *ibid*.

2. Since, the buyer's agreement has been executed on 13.12.2008 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Centra One", Sector-61, Gurugram, Haryana.
2.	RERA registered/ not registered	Not Registered
3.	Unit no.	08-804
4.	Unit measuring	1028 sq. ft'
5.	Buyer's agreement executed on	13.12.2008
6.	Total sale consideration	Rs. 68,42,963/- (Annexure - Y, page - 90)
7.	Total amount paid by the complainants till date	Rs.64,16,893/- (Annexure - Y, page - 90)
8.	Percentage of consideration amount	93.77%
9.	Payment plan	Construction linked plan
10.	Date of delivery of possession Clause 2.1 - possession shall be delivered by 31.12.2011	31.12.2011
11.	OC received on	9.10.2018
12.	Offer of possession	26.11.2018 (as alleged by the respondent)



13.	Delay in handing over possession till date	6 years 10 months 26 days
14.	Penalty clause as per buyer's agreement	Clause 2.3 - Rs. 15 per sq. ft' of the super area.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A buyer's agreement is available on record for the aforesaid unit. The possession of the said unit was to be delivered by 31.12.2011 as per the said agreement. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent has filed the reply.

Facts of the complaint

6. The complainant purchased a commercial unit bearing no. 08-804 admeasuring 1028 sq. ft' in the project named Centra One, Sector-61, Gurugram. A space buyer's agreement was executed on 17.5.2014 and the complainant made a payment of Rs.64,16,893/-.
7. On page 11 clause 2 it was specifically indicated that the respondent shall deliver possession of the unit by 31.12.2011. the respondent no.1 has delayed the project by



more than 7 years and has taken more than 95% of the total payment against the said unit.

8. The complainant has tried to contact the respondent on various occasions for possession of the unit but the respondents have not been able to provide the same.

9. **Issues raised by the complainants**

- i. Whether the promoter has caused delay in providing possession of the property?
- ii. Whether the promoter has registered itself as per RERA compliance?
- iii. Whether the complainant is entitled for refund of his entire amount along with interest and compensation?

10. **Relief sought**

The complainants are seeking the following reliefs:

- i. Respondents be declared to refund the entire money received by them from the complainant on account of the booking along with an interest @18% p.a. to the complainant from the date of each



individual payment, on account of failure to provide the possession of the property in timely manner.

- ii. Any other order which this hon'ble authority deems fit in the interest of justice.

Reply on behalf of respondent

11. It is humbly submitted before this hon'ble authority that Director, Town and Country Planning Department (Haryana) has issued occupation certificate dated 9.10.2018 to the respondents for the project in question 'Centra One' located in Sector-61, Gurugram. It is further submitted that accordingly, the respondents have already sent the offer of possession to the complainant in terms of the duly executed space buyer's agreement dated 10.12.2008.
12. As contemplated in section 13 of the Act, subsequent to the commencement of the rules, a promoter has to enter into an agreement for sale with the allottees and get the same registered prior to receipt of more than 10 percent of the cost of the plot, or building. Form of such agreement for sale has to be prescribed by the relevant State Government and such agreement for sale shall specify amongst various other things, the particulars of development, specifications, charges, possession timeline, provisions of default etc.



13. By a notification in the Gazette of India dated 19.4.2017, the Central Government, in terms of Section 1 (3) of the Act prescribed 1.5.2017 as the date on which the operative part of the Act became applicable. In terms of the Act, the Government of Haryana, under the provisions of Section 84 of the Act notified the rules on 28.7.2017.
14. Rule 8 (1) clearly specifies that the form of the “agreement for sale” is prescribed in Annexure A to the rules and in terms of section 13 of the Act the promoter is obligated to register the agreement for sale upon receipt of any amount in excess of 10 percent of the cost of the plot. Rule 8(2) provides that any documents such as allotment letter or any other document executed post registration of the project with the RERA between the promoter and the allottee, which are contrary to the form of the agreement for sale, Act or Rules, the contents of the form of the agreement for sale, Act or rules shall prevail.
15. It is very important to note that the rule 8 deals with documents executed by and between promoter and allottee after registration of the project by the promoter, however with respect to the documents including agreement for sale/ flat buyers agreement/plot buyers agreement executed prior to the registration of the project which falls within the



definition of “Ongoing Projects” explained herein below and where the promoter has already collected an amount in excess of 10 percent of the total price rule 8 is not applicable.

16. The aforesaid view stated in the preceding para is clarified in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in Annexure A of the rules, it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers.
17. The parties had agreed under the space buyer’s agreement (SBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Clause 20 of the SBA is reproduced below for ready reference:

“20 Arbitration: Any disputes, differences or disagreement arising out of this Agreement, which cannot be settled amicably, shall be referred to Arbitration in accordance with the provisions of the Arbitration and conciliation Act, 1996 (as amended from time to time). The Intending Purchaser agrees that the Intending Seller shall appoint a sole Arbitrator and the decision of the said arbitrator shall be final and binding on the Parties. The venue of the arbitration shall be New Delhi.”



18. Admittedly, the complainant has raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.
19. The complainant has alleged that the respondents have delayed the project and even in terms of the SBA whereby the respondent had agreed to handover possession by 31.12.2011, there has been a huge delay.
20. In this context, it is submitted that the respondent with a view to create a world class commercial space, engaged renowned architects Cervera and Pioz of Spain for the said project. The respondent also engaged renowned contractor M/s Ahluwalia Contracts (P) Ltd. for the said project. The respondent launched the project with a vision of creating an iconic building and hence, engaged the best professionals in the field for the same who are well known for their timely commitment as well.
21. The respondent had conceived that the project would be deliverable by 31.12.2011 based on the assumed cash flows from the allottees of the project. However, it was not in the



contemplation of the respondent that the allottees including the complainant herein would hugely default in making payments and hence, cause cash flow crunch in the project. The complainant also knew that as per the agreement, timely payment of the installments was the essence of the contract.

22. The complainant, in view of the fact that the complainant has relied upon clause 2.1 of the agreement for the timelines, it is submitted that the said timelines for possession till 31.12.2011 were subject to compliance of all terms and conditions of the agreement, including but not limited to timely payment of all the dues. A further grace period of 6 months was also agreed to between the parties. As detailed above, the complainant hugely defaulted in making timely payments of the various installments and despite grant of numerous opportunities, failed to clear dues. Hence, the timelines for possession stood diluted because of the acts/ defaults of the various allottees.

23. It is further submitted that the project 'Centra One' is a Greenfield project, located at Sector 61, Gurgaon. All customers including the complainant were well informed and conscious of the fact that timely payment of all the demands was of essence to the contract. Majority of customers opted for construction linked payment plan after clearly



understanding that and agreed upon to tender the payment as per the construction milestones. It is pertinent to mention here that, given the choice of payment plan and terms of the agreement, all the customers including the complainant specifically understood that a default in tendering timely payment by significant number of customers, would delay the construction activity. It is a matter of fact and record that the space/unit holders as a group have defaulted in making timely payment which has caused major set-back to the development work.

24. It is submitted that in the 1st year (FY 07) demands amounting to Rs.20.84 Crores were raised by the Respondent in accordance with the payment plans chosen by customers, and only Rs.15.83 Crores was paid by the customers. Over 43% customers defaulted in making timely payment in FY2007, and percentage of defaulting customers swelled to 56%, 40% and 68% in the FY 09, 10 and 11 respectively.

25. It is noteworthy to mention here that, with the sole intention of completing the project within reasonable time, the respondent offered additional benefit of Timely Payment Discount (TPD) which was not in the contemplation of the Respondent while launching the Project and hence, caused further outflow of funds, just to seek timely payments from



the customers. In fact, in May 2009, the Respondent offered the following discounts and incentives to its customers, in excess of the terms and conditions of the agreement, in huge favour of the customers:

26. The respondent offered an additional timely payment discount (TPD) of 10% in basic sale price (BSP) to those customers who would make the payments of the various installments within the stipulated time stated in the said demand letters. This amounted to a substantial discount of Rs. 257/- per sq. ft' had the customers made all their remaining payments within time. Unfortunately this scheme did not have a favorable result as only few customers availed this benefit. The customers who availed this scheme and paid their installments on time were given the TPD amounting to Rs.1.42 Crores.

27. The respondent also offered an additional discount of 10% on net inflow of uncalled BSP in case any customer decided to opt for pre/ upfront payment. The aim of this scheme was that the project to get adequate cash flow for construction. Unfortunately this significant discount didn't produced fruits as it attracted only few customers.



28. Further in order to express seriousness of its commitment to complete the project, the respondent doubled the delayed possession penalty from the agreed amount of Rs.15/- sq. ft' per month to Rs. 30/- sq. ft. per month, for the eligible customers in light of the terms and conditions of the SBA.
29. The above mentioned attempts of respondent failed to persuade a significant number of customers to make timely payment, which is the principal reason for the delay of the completion of the project. In fact, on the one hand, the respondent suffered further cash crunch by granting TPD benefits for making timely payments and on the other hand did not receive payments due to huge defaults by the various allottees in adhering to the time lines for payment. Hence, the delay was occasioned due to acts and omissions of the various allottees of the project.
30. Thus, it is further evident that the customers as a group defaulted in making timely payments, which obviously had a rippling effect on the development of the project and hence, the possession timelines also stood diluted accordingly. It is further submitted that in case the complainant wants to withdraw the booking of the unit in question, the same shall be governed by the duly agreed clauses of the agreement executed between both the parties.



31. In addition to the above submissions, it is pertinent to mention that the project 'Centra One' was marred by force majeure circumstances which were beyond the reasonable control of the respondents and hence, despite the fact that the construction was complete for long, it took a long time for issuance of occupation certificate.

32. The respondents applied for the approval of building plans on 29.5.2008 and the building plans of the project were approved in principal in the building plan approval committee meeting held on 21.7.2008 subject to minor corrections which were conveyed to the respondent on 30.7.2008. The respondents on 27.8.2008 submitted corrected building plans which were not released despite fulfilment of all the requisite requirements. Although, neither the Act nor the rules provide that due to non- payment of EDC/ IDC, building plans can be withheld, as a matter of abundant caution, respondents furnished undertakings dated 15.1.2009 and 16.1.2009. Thereafter, the DTCP after 6 months from the date of submission of corrected building plans i.e. 27.8.2008 after six months directed the respondent to clear EDC/IDC dues on 27.2.2009. The respondent deposited full amount of IDC/EDC on 3.8.2010 despite the fact that the customers had defaulted in making payments of



EDC/ IDC called from them. However, in the meanwhile, the license expired and hence, renewal of the license was applied for by the respondent. In the meanwhile, in view of the notification qua enhanced EDC (EEDC), demand for the same was made before issuance of approved building plan. The respondents complied with the said demand and entire EDC also stood paid by 22.3.2012, despite the fact that the allottees in general defaulted in making payment of EDC at the stage when the demand was raised. In the meanwhile, in view of the order passed by the hon'ble high court of Punjab and Haryana in the matter of CWP No. 20032/2008, 12594/2009 and 2807/2012, DTCP directed respondents to confirm the source of water for construction, which was duly provided by the respondents. Thereafter, the respondents continuously followed up with the department to formally release the building plans however for some reason or the other, the building plans were not released. It is further pertinent to point out that the respondents had complied with all the requirements for formal approval of the building plans within the stipulated time, to ensure that the formal release of the same is not hindered. In fact with a view to handover possession since the building is already constructed and complies with all the building bye laws, rules



and regulations, respondents paid a huge amount of Rs. 7,37,15, 792/- as composition fee for raising the building without formal release of building plans. Upon payment of the composition fee, the entire building, from basement till top floor, stands regularized. In the meanwhile, the respondents were advised to formally seek approval of building plans where after, the case for grant of occupation certificate would be considered. Accordingly, the respondents formally applied for approval of building plan which was done and finally the building plan was approved by the department and thereafter, the application for grant of occupation certificate (OC) was considered and OC was granted on 9.10.2018.

33. It is however, pertinent to point out that the respondents have received occupation certificate dated 9.10.2018 from the competent authority and accordingly, the respondents have already issued the offer of possession to the complainant and dispatched the same on 3.12.2018.

Determination of issues

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:



34. With respect to the **first and third issue**, the authority came across clause 2.1 of buyer's agreement. The clause regarding the possession of the said unit is reproduced below:

"2.1 Possession

The possession of the premises shall be endeavoured to be delivered to the intending purchaser by 31.12.2011."

Accordingly, the due date of possession was 31.12.2011 and the possession was offered on 26.11.2018 so there has been a delay of 6 years 10 months 26 days till now.

Here, the complainant cannot be provided refund as the possession has already been offered but he will get the delay compensation. Moreover, the delay compensation payable by the respondent @ Rs.15/- per sq. ft' per month of the super area of the unit for the period of delay as per clause 2.3 of buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)*, wherein the Bombay HC bench held that:

"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the



society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

35. The promoter is liable under section 16(a)(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. The prayer of the complainant regarding payment of interest at the prescribed rate for every month of delay, till handing over of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per provisions of section 16(a)(1) is hereby allowed. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. 31.12.2011 till the offer of possession i.e. 26.11.2018.

36. With respect to the **second issue**, the respondent has not registered its project with the authority which is an obligation under section 3 of the Act. So, penal proceedings under section 59 shall be initiated against the respondent company.



Findings of the authority

37. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
38. For the issue of arbitration clause raised by the respondent, the amendment of section 8 of the Arbitration and conciliation act does not have the effect of nullifying the ratio of catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the Authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.



39. As the possession of the apartment was to be delivered by 31.12.2011, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.

40. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation.

41. In the present complaint, the complainants are seeking refund of the entire money paid till date i.e. 64,16,893/- along with interest @18% p.a. from the date of provisional allotment till its realization of the payment and cancel the allotment upon entire refund.

42. However, keeping in view the present status of the project and the fact that the possession has already been offered, the authority is of the view that refund cannot be allowed at this time to the complainants as it will hamper the interest of other allottees who wish to continue with the project.



43. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession.

Decision and directions of the authority

44. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) Since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation and Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.
- (ii) Occupation certificate has been received by the respondent on 9.10.2018. Respondent has offered the possession of the unit to the complainant on 26.11.2018.
- (iii) As per clause 2.1 of the space buyer agreement dated 13.12.2008 for unit no.08-804, in project



“Centra One” sector-61, Gurugram, possession was to be handed over to the complainant by 31.12.2011. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.64,16,893/- to the respondent against a total sale consideration of Rs.68,42,963/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 31.12.2011 till 26.11.2018, as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.

- (iv) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.
- (v) The final give/take may be made after adjusting the dues from the buyer/complainant within 30 days of receipt of offer letter. Both the parties are directed to get the conveyance deed executed within a period of 30 days.



45. Complaint stands disposed of.
46. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Dated: 5.2.2019

Judgement uploaded on 26.02.2019



HARERA
GURUGRAM

