

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 05.02.2019
Complaint No.	712/2018 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.

Arguments heard.

As per clause 2.1 of the Space Buyer Agreement dated 10.12.2008 for unit No.08-803, 8th floor, 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.65,73,634/- to the respondent against a total sale consideration of Rs.68,03,397/-. 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. : 712 of 2018
First date of hearing : 05.02.2019
Date of decision : 05.02.2019

M/s Rosemary Hospitality Private Limited
(through its AR Sh. Surender Kumar),
Address: M-3/60, Ground Floor, DLF City,
Phase II, Gurugram, Haryana.

Complainant

Versus

1. M/s Anjali Promoters & Developers Pvt.
Ltd.
Address: 7 Barakhamba Road, New Delhi,
Delhi- 110001.
2. BPTP Limited
Address: 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 complainant
Shri Shashank Bhushan Advocate for the respondents

ORDER

1. A complaint dated 10.08.2018 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 M/s Rosemary Hospitality Private Limited, against the promoters M/s Anjali



Promoters & Developers Pvt. Ltd. and another, on account of violation of the clause 2.1 of space buyer's agreement executed on 10.12.2008 in respect of shop/unit described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the space buyer's agreement has been executed on 10.12.2008 i.e. prior to the commencement of the Act *ibid*, 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 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 are as under: -

1.	Name and location of the project	"Centra One", Sector 61, Gurugram.
2.	Nature of the project	Commercial complex
3.	Project area	3.675 acres
4.	Registered/ not registered	Not registered
5.	DTCP license no.	277 of 2007 dated 17.12.2007
6.	Occupation certificate granted on	09.10.2018 [page 31-32 of reply]
7.	Date of execution of space buyer's agreement	10.12.2008 [page 36 of complaint]
8.	Shop/unit no. as per letter dated 06.05.2014 [Page 80 of complaint]	08-803, 8 th floor (old-910, 9 th floor as per the said agreement)
9.	Unit measuring	998 sq. ft.



		(old unit-1000 sq. ft.)
10.	Payment plan	Construction link payment plan [page 57 of complaint]
11.	Consideration amount as per agreement dated 10.12.2008	Rs.57,75,000/-
12.	Total net cost of the unit as per statement of account dated 05.02.2015	Rs.68,03,397.14/- [page 82 of complaint]
13.	Total amount paid by the complainant as per statement of account dated 05.02.2015	Rs.65,73,634/-
14.	Due date of delivery of possession as per clause 2.1 of space buyer's agreement dated 10.12.2008.	31.12.2011
15.	Delay in handing over possession till the date of decision	7 years 1 month 5 days
16.	Penalty clause as per space buyer's agreement dated 10.12.2008	Clause 2.2 of the said agreement i.e. If the intending seller fails to deliver the possession of the said premises by 30.06.2012 then the intending seller shall be liable to pay penalty @ Rs.15/- per sq. ft. per month up till the date of handing over of the said premises by giving appropriate notice to the intending purchaser.



4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondents. A space buyer's agreement dated 10.12.2008 is available on record for the aforesaid unit/shop according to which the possession of the

said unit was to be delivered by 31.12.2011. Neither the respondents have delivered the possession of the said unit as on date to the purchaser nor they have paid any penalty for the delay in handing over possession of the said unit in terms of clause 2.2 of the said agreement duly executed between the parties. Therefore, the promoters have not fulfilled their committed liability.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The respondent through its counsel appeared on 05.02.2019. The case came up for hearing on 05.02.2019. The reply filed on behalf of the respondent no.1 on 06.12.2018 has been perused.

Facts of the complaint

6. Briefly stated, the facts of the complaint are that on 30.10.2006, the original allottee i.e. M/s Jain Edibles Pvt. Ltd. applied for booking in BPTP's then upcoming project and an advance of Rs.11,55,000/- was given vide cheque dated 30.10.2006. The complainant purchased the unit from the original allottee and the entire amount with the respondent no. 1 on account of booking was transferred in the name of the complainant.



7. The complainant submitted that a commercial unit bearing no. 08-803 tentatively measuring super area of 998 sq. ft. in the project named as Centra One, Sector-61, Gurugram was purchased by the complainant. A space buyer's agreement for the above said unit was executed on 17.05.2008 [**Note: date of execution of space buyer's agreement has been wrongly mentioned by the complainant as space buyer's agreement dated 10.12.2008 is available on record**]. A payment of Rs.65,73,634/- has already been made against the said commercial unit.
8. The complainant submitted that as per clause 2 of the said agreement, the respondents were liable to deliver the possession of the said unit by 31.12.2011. The respondent no.1 has delayed the possession of the said unit for period of more than 7 years and has yet not been able to deliver the same and in addition has also taken more than 95% payments against the said unit, due to which the complainant has suffered humongous losses.
9. The complainant submitted that it has on numerous occasions tried to contact the above-named respondents for possession of the said unit but the respondents have failed miserably and has not been able to offer the possession. Thus, the



complainant seeks the refund of the entire money by the complainant along with the interest.

10. Issues raised by the complainant are as follow:

- i. Whether the respondent has breached the space buyer's agreement by not delivering the possession of the said unit and there is no reasonable justification for delay?
- ii. Whether the complainant is entitled for refund of entire amount along with interest?
- iii. Whether the respondent have registered themselves as per RERA compliances?

Relief sought by the complainant:

11. The complainant is seeking refund of entire amount paid along with interest from the date of each individual payment, on account of failure to provide the possession of the property in timely manner.

Respondent's reply:

12. The respondents submitted that Director, Town and Country Planning Department (Haryana) has issued occupation certificate dated 9.10.2018 to the respondents for the said project. The respondents further submitted that they would be shortly sending the offer of possession to the complainant in terms of the duly executed space buyer's agreement dated 10.12.2008.



13. The respondents submitted that the agreements that were executed prior to the registration of the project under the Act ibid shall be binding on the parties and cannot be reopened.
14. The respondents submitted that the parties had agreed under clause 20 of the space buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. The respondent admitted that the complainant has raised dispute but did not take any steps to invoke arbitration. The allegations made requires proper adjudication by tendering evidence, cross examination etc. and therefore, cannot be adjudicated in summary proceedings.
15. The respondents submitted that the complainant has alleged that in terms of the said agreement the respondent has agreed to handover possession by 31.12.2011 and there has been a huge delay. In this context, the respondent submitted that with a view to create a world class commercial space, it has engaged renowned architects Cervera and Pioz of Spain 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. 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.

16. The respondents 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 dues. A further grace period of 6 months was also agreed to between the parties. Hence, the timelines for possession stood diluted because of the acts/defaults of the various allottees.
17. The respondents submitted that in the 1st year (FY 07) demands amounting to Rs.20.84 crores were raised by the respondents 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.



18. The respondents submitted 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:

- i. The respondents 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 instalments 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.
- ii. The respondents 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 to get adequate cash flow for construction of the said project. Unfortunately, this significant discount didn't produced fruits as it attracted only few customers.

- iii. Further, in order to express seriousness of its commitment to complete the project, the respondents 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 said agreement.

The respondents submitted that 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 completion of the project.

19. The respondent submitted that the said project 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. The respondents have received occupation certificate dated 09.10.2018 from the competent authority and accordingly, the respondents



shall be shortly issuing the offer of possession to its customers of the said project including the complainant.

20. The respondents denied that the commercial unit bearing no.08-804 tentatively measuring 1028 sq. ft. in the project named 'Centra One' was purchased by the complainant. It is submitted that the complainant company is second subsequent allottee to the unit in question and have purchased the said unit from the open market out of its own will and volition. It is further submitted that the 1st subsequent allottee (Ananya Securities and Finance Pvt. Ltd.) was initially tentatively allotted unit no.09-909, however, as per the agreement, the unit no. was relocated to 08-804 after the unit was transferred to the complainant on 05.07.2018.

21. The respondents denied that the space buyer's agreement for the above said unit was executed on 17.05.2014 or that in lieu of same, the complainant has acquired all his rights. It is submitted that the 1st subsequent allottee (Ananya Securities and Finance Pvt. Ltd.) has entered into the space buyer's agreement with respondent no.1 on 13.12.2008. It is further submitted that agreement has been executed between the parties for allotment of the unit in the name of the complainant, however the complainant has not acquired all its rights towards the said property.



Determination of issues

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

22. With respect to the **first issue** raised by the complainant, as per clause 2.1 of space buyer's agreement, the possession of the flat was to be handed over by 31.12.2011. The clause regarding the possession of the said unit is reproduced below:

"2. Possession

2.1 The possession of the said premises shall be endeavoured to be delivered to the intending purchaser by 31st December 2011, however, subject to clause 9 herein and strict adherence to the terms and conditions of this agreement by the intending purchaser..."

23. Accordingly, the due date of possession is 31.12.2011 and the possession has been delayed by 7 years 1 month and 5 days from due date of possession till the date of decision. Therefore, the respondent has breached the said agreement by not delivering the possession of the said unit.
24. With respect to the **second issue** raised by the complainant, the complainant is seeking refund of the entire money paid towards the said unit along with interest for delay in handing over possession. However, keeping in view the present status of the project and intervening circumstances, the authority is of the view that in case refund is allowed in the present



complaint, it will hamper the completion of the project as the project is complete and the occupation certificate was granted to the respondent on 09.10.2018 by the concerned authority. Moreover, for protecting the right of one allottee, right of other allottees who wish to continue with the project cannot be jeopardised by allowing refund in the present case. Therefore, keeping in view the principles of natural justice and in public interest, the refund of the deposited amount cannot be allowed. However, as the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso read with rule 15 of the rules ibid, to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.

25. With respect to the **third issue** raised by the complainant, the promoter is liable to get itself registered with this hon'ble authority under Act ibid in terms of section 3(1) first proviso which provide:

The project that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act i.e. three months from 01.05.2017. The promoter received the



occupation certificate on 09.10.2018 and therefore cannot claim exemption under this provision. It was held in the landmark case of ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd. (7 of 2018), on 21.08.2018*** delivered by the hon'ble authority that incomplete application is no application in the eyes of law. From the perusal of the OC, it is clear that the no objection from fire service was received on 10.08.2018 and the report from chief engineer was obtained on 01.08.2018. As the promoter submitted an incomplete application for OC therefore, he cannot be benefited under the deemed provision and is not exempted from registration under section 3 of the Act *ibid*.

Findings of the authority

26. **Jurisdiction of the authority**-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 complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority,



Gurugram shall be entire Gurugram District. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

27. An amendment to the complaint was filed by the complainant along with the complaint wherein he has stated that he is not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserve his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.
28. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.
29. The authority is of the considered opinion that it has been held in a 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.

30. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Hon'ble Supreme Court in **civil appeal no. 23512-23513 of 2017**.

31. As per clause 2.1 of the space buyer's agreement dated 10.12.2008 for said unit/shop in the project 'Centra One', Sector 61, Gurugram possession was to be handed over to the complainant by 31.12.2011. It was construction linked plan. The complainant has already paid Rs.65,73,634/- to the respondent against the total sale consideration of Rs.68,03,397/-. However, the respondents have obtained occupation certificate dated 09.10.2018 but has not delivered the unit in time and the possession has not been offered by the respondent to the complainant till date. 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 the handing over of possession as per section 18 of the Act *ibid*.



Directions of the authority

32. 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) The respondents are directed to initiate the process of giving notice of possession as the respondents have already received the occupation certificate.
- (ii) The respondents are directed to pay the interest so accrued on the amount paid by the complainant i.e. Rs.65,73,634/- at the prescribed rate for every month of delay from the due date of possession i.e. 31.12.2011 till the handing over of possession.
- (iii) The respondents are directed to pay accrued interest to the complainant from the due date of possession till the date of decision, on account of delay in handing over of possession to the complainant within 90 days from the date of decision. Thereafter, the monthly payment of interest till handing over of the possession, so accrues shall be paid by 10th of every succeeding month.



(iv) The final give/take may be after adjusting the dues from the 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.

33. As the project is registerable and has not been registered by the promoter, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter.
34. The order is pronounced.
35. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Dated: 05.02.2019

Judgement Uploaded on 13.03.2019

