

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

Complaint no. : 242 of 2019
First date of hearing : 23.04.2019
Date of decision : 23.04.2019

Mrs. Leela Jain and another
R/o 143 Chaucher Court Willow Brook
Illinois, USA-60527

Complainants

Versus

M/s Athena Infrastructure Ltd.
(Through its Managing Director
and other Directors)
Office address: M62 and 63, first floor,
Connaught place, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Ms. Medhya Ahluwalia Advocate for the complainants
Shri Rahul Yadav Advocate for the respondent

ORDER

1. A complaint dated 01.02.2019 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 Mrs. Leela Jain and another, against the promoter M/s Athena Infrastructure Ltd, on account of violation of the clause 21 of the flat buyer's

agreement executed on 23.06.2014 in respect of flat described below in the project 'Indiabulls Enigma' 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 flat buyer's agreement has been executed on 23.06.2014 i.e. prior to the commencement of the Act *ibid*, so the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory 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 case are as under: -

1.	Name and location of the project	"Indiabulls Enigma", Sector 110, Gurugram,
2.	Project area	15.6 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	213 of 2007 dated 5.9.2007, 10 of 2011 dated 29.1.2011 and 64 of 2012 dated 20.6.2012
5.	RERA registered/ not registered.	Registered
6.	RERA registration number	354 of 2017 (Phase 2)
7.	RERA registration valid up to	30.09.2018

		(applied for extension, as per annexure 1 pg. no. 23)
8.	Revised building plan approval (as per annexure 3 of reply, pg. no. 29)	23.08.2013
9.	Flat/unit no.	B163, 16 th floor, tower B
10.	Flat admeasuring	3350 sq. ft.
11.	Date of execution of flat buyer's agreement-	23.06.2014
12.	Payment plan	Subvention plan
13.	Basic sale price as per clause 4 of the flat buyer's agreement	Rs.2,47,20,000/-
14.	Payment plan	Possession linked plan
15.	Total amount paid by the complainant till date as per applicant ledger dated 31.10.2018	Rs. 1,07,23,386/- [pg. no. 83 of complaint]
16.	Date of delivery of possession as per clause 21 of flat buyer's agreement (3 years + 6 months grace period from the date of execution of agreement i.e. 23.06.2014)	23.12.2017
17.	Delay in handing over possession till date of decision i.e. 23.04.2019	1 year 4 months
18.	Penalty as per clause 22 of the said flat buyer's agreement	Rs.5/- per sq. ft. per month for the period of delay

4. 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 respondent. A flat buyer's agreement dated 23.06.2014 is available on record for the aforesaid apartment according to which the possession of the same was

to be delivered by 23.12.2017. Neither the respondent has delivered the possession of the said unit till date to the complainants nor has it paid compensation @ Rs.5/- per sq. ft. per month for the period of delay as per clause 22 of flat buyer's agreement duly executed between the parties. 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 appearance. The case came up for hearing on 23.04.2019. The respondent through its counsel appeared on 23.04.2019. The reply filed on behalf of the respondent has been perused by the authority.

Facts of the complaint

6. Briefly stated, the facts of the complaint are that the complainants booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon.

7. The complainants submitted that the representatives of respondent represented to the complainants that Indiabulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd. and Varali Properties Ltd. The complainants were induced by showing brochures and advertisements material depicting that the project will be developed as a state-of-art project and shall be one of its kind.
8. It was stated that the “Indiabulls Enigma” is a premium high-end multi-storey project being developed with the assistance of internationally renowned architects and all necessary sanctions and approvals has been obtained to complete the same within the promised time frame.
9. The complainants submitted that they were induced by the assurances and promises made by the respondent and booked a flat in the project in question and paid the booking amount in May 2014.
10. The complainants submitted that a flat buyer’s agreement was executed on 23.06.2014 and the complainants were allotted flat no. B – 163 on 16th floor in tower – B, admeasuring 3,350 sq. ft.

11. A letter of allotment dated 11.07.2014 was issued by the respondent in favour of the complainants. The complainants have paid a total sum of Rs. 1,07,23,386/- towards the aforesaid residential flat in the project from May 2014 to July 2014 as and when demanded by the respondent.
12. The complainants submitted that the respondent promised to complete the project within a period of 36 months from the date of execution of the flat buyer's agreement with a further grace period of 6 months. The flat buyer's agreement was executed on 23.06.2014 and till date the construction is not complete. The respondent has collected a considerable portion of the sale consideration within one year of the booking.
13. The complainants submitted that the respondent has failed to complete the project in time, resulting in extreme mental distress, pain and agony to the complainants.
14. The complainant submitted that the project Indiabulls Enigma comprises of towers A to J. The tower D is to be developed by Varali Properties Ltd. Other towers i.e. A to C and E to J are being developed by the respondent herein. It was presented to the complainants that towers A to D will have 17 floors.

However, during the construction the respondent changed the original plan and revised the same to the detriment of the complainants and unilaterally increased 4 floors in towers A to D. The increase in floors changed the entire theme of the project; which shall ultimately disturb the density of the colony and its basic design attraction and will also create an extra burden on the common amenities and facilities. Moreover, the strength of the structure of towers A to D has been compromised, the foundation designed and built for 17 floors would not withstand the additional load of 4 floors.

15. The respondent did not seek the consent of the complainants for increasing the floors and increased the floors in a secretive manner. It is stated that the enhancement of FAR is in total violation of representations made in the respondent's advertisement material displayed at site as well as on the internet.

16. The complainants submitted that they visited the site and observed that there are serious quality issues with respect to the construction carried out by respondent. The respondent has compromised with levels of quality and are guilty of

misrepresenting. There are various deviations from the initial representations. The structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard low grade defective and despicable construction quality.

17. The complainants further submitted that the respondent has illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of HVAT. The complainants after gaining fact about illegal collection of EDC/IDC on numerous occasions approached the respondent at its premises and requested for the refund of excess amount, thereafter the respondent on 14.09.2016 refunded the excess amount of Rs. 2,86,425/-. The respondent did not pay any interest to the complainants on the amount of Rs. 2,86,425/- which the respondent had illegally withheld for more than three years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax.

Issues raise by the complainants

18. The complainant has raised the following issues:

- i. Whether the respondent has unjustifiably delayed the construction and development of the project and is liable to pay interest till the possession is handed over to the complainant?
- ii. Whether the respondent has wrongfully resorted to increase in floors/increase in floor area ratio changing the entire theme of the project?

Reliefs sought by the complainants

19. The complainant is seeking the following reliefs:

- i. Direct the respondent to pay interest for every month of delay till the hand over the possession of the flat.
- ii. Direct the respondent to pay a sum of Rs. 50,000/- to the complainant towards the cost of the litigation.

Respondent's reply

20. The respondent submitted that the instant complaint is not maintainable, on facts or in law, and is as such liable to be dismissed at the threshold being filed in the provisions being

outside the purview of this hon'ble authority. The present complaint is devoid of merits and has been preferred with the sole motive to harass the respondent.

21. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact and law. The instant complaint is devoid of any merits and has been preferred with the sole motive to extract money from the respondent. Hence the same is liable to be dismissed.
22. The respondent submitted that the relationship between the complainant and the respondent is governed by flat buyer's agreement dated 23.06.2014 and clause 22 of flat buyer's agreement covers the exigencies of inordinate delay caused in completion and handing over of the unit.
23. The respondent submitted that it has already completed 95% construction of the tower B and has filed extension before the Haryana Real Estate Authority, Gurugram vide letter dated 18.09.2018. It would be completing the construction of project within time frame communicated to the authority and would be applying for occupational certificate for the alleged tower very soon. The delay in delivering the possession of the flat

was beyond the control of the respondent, since number of permissions and sanctions are to be required from numerous government authorities and the government restrictions including National Green Tribunal which imposed a ban on carrying out constructions in Delhi-NCR for several months, delayed the project with no fault on the part of the respondent.

24. The respondent further submitted that clause 39 of the flat buyer's agreement has a special provision with respect to contingencies. The respondent has been diligently pursuing the matter with various authorities and hence no delay can be attributed on the part of the respondent.

25. The respondent submitted that the flat buyer's agreement dated 23.06.2014 was executed much prior to coming into force of the Rules, 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under Act, 2016 has to be in reference to the agreement for sale executed in terms of said Act and said Rules and no other agreement, whereas, the flat buyer's agreement being referred to or looked into in this

proceeding is an agreement executed much before the commencement of RERA.

26. The respondent submitted that the increase in floors does not changes the theme of the project by disturbing the density of the colony and its basic design. It is denied that the change would create extra burden on common amenities, facilities and the strength of the foundation. The extra floors constructed are at the expense of the developer and have no bearing on the amounts paid by the complainants. The respondent have performed its part of the contract by constructing 17 floors and that the construction is going at full swing.

27. In accordance with clause 18 of the of the flat buyer's agreement, the complainants were very well aware of the fact that the floor plans were tentative and were liable to be changed, altered, modified, revised, added, deleted, substituted or recast during the course of the construction. The revision was done in accordance with the terms and conditions of booking and allotment. The revised plans were

sanctioned in accordance with the rules and regulations of the competent authorities.

28. The respondent further submitted that according to the rules and regulations, notifications were published with regard to change in the plans by the respondent company in leading newspapers namely 'The Tribune' on 26.04.2013 and in 'Hindustan Times' and 'Dainik Jagran' on 27.04.2013. However, no objections were received from any of the allottee in respect of amendments made in the building plans by the respondent. Accordingly, revised building plans were approved and sanctioned vide letter dated 23.08.2013 by DTCP, Haryana.
29. The respondent is in the process of completing the said project as per the requisite specifications and the materials used for the project have not been compromised with. The respondent is a reputed real estate company having immense goodwill.
30. The respondent submitted that as mentioned in clause 3 of the flat buyer's agreement, 02 car parking spaces have been provided to the complainants and the total selling price was inclusive of the charges for the parking as well. No separate

amount has been charged by the respondent towards the same. It is also denied that illegal charges towards EDC and IDC has been charged from complainants or has misrepresented with respect to the claim of VAT.

31. The respondent further submitted that the project “Indiabulls Enigma” is at an advance stage of completion. The tower in question is already complete and the occupation certificate has already been obtained and the respondents has already called upon the complainants to take possession of their booked unit prior filling of the instant complaint by the complainants. The respondent has already expended around (approximately) Rs. 270 crs. on the construction of the project. In light of the same this hon’ble authority may take a lenient view and condone the delay so caused and exempt the period of delay on account of the reasons mentioned herein.

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:

32. With respect to the **first issue** raised by the complainant, the authority is of the view that the respondent has delayed the delivery of possession of the booked unit. This is fortified from the fact that as per clause 21 of the said agreement dated 23.06.2014, the construction was to be completed within a period of 3 years with a grace period of 6 months from the date of execution of the agreement. The grace period of 6 months is given to the respondent due to exigencies beyond the control of the respondent. The relevant clause is reproduced as under:

“The developer shall endeavour to complete the construction of the said unit within a period of three years with a six months grace period thereon from the date of execution of flat buyer’s agreement subject to timely payment by the buyer of the total sale price payable according to the payment plan applicable to him or as demanded by the developer...”

33. The due date of possession comes out to be 23.12.2017 and the possession has been delayed by 1 year 4 months 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 by the due date. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the super area of the unit for the period of delay

beyond 3 years + 6 months as per clause 22 of flat 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 others. (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."

The complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.70% per annum w.e.f 22.12.2017 till 23.04.2019 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

34. With respect to **second issue** raised by the complainants, from perusal of record it is observed by the authority that the increase in floor area was in accordance with the revised

building plan issue by DTCP on 23.08.2013. Hence, this issue is decided in negative.

Findings of the authority

35. 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.

36. The complainants 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.

37. Arguments heard. As per clause 21 of the flat buyer's agreement dated 23.06.2014 for unit no. B163, tower-B, in project "Indiabulls Enigma", Sector-110, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of flat buyer's agreement + 6 months grace period which comes out to be 23.12.2017. However, the respondent has not delivered the unit in time. Complainants have already paid Rs.1,07,23,386/- to the respondent against a basic sale price of Rs.2,47,20,000/- . As such, complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.70% per annum w.e.f 23.12.2017 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.

Decision and directions of the authority

38. After taking into consideration all the material facts adduced 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:

- (i) The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.70% per annum w.e.f 23.12.2017. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order. Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid on or before 10th of subsequent month
- (ii) The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.70% by the promoter which is the same as is being granted to the complainants in case of delayed possession.
- (iii) The promoter shall not charge anything from the complainant which is not part of the builder buyer's agreement.

39. The order is pronounced.

40. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.04.2019

Judgement Uploaded on 29.05.2019



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