

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

Complaint no. : 345 of 2019
First date of hearing : 16.05.2019
Date of decision : 16.05.2019

Mr. Harish Kumar Dham and Mrs. Satya Dham
Both R/o H.no. 858, Pocket E, Sector 21,
Gurugram

Complainants

Versus

M/s Athena Infrastructure Ltd.
Office address: M62 & 63, First Floor,
Connaught Place, New Delhi-110001.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Harish Kumar Dham and Mrs. Satya Dham — Complainants in person
Shri Abhay Jain — Advocate for the complainants
Shri Rahul Yadav — Advocate for the respondent

ORDER

1. A complaint dated 08.02.2019 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 complainants Mr. Harish Kumar Dham and Mr. Satya Dham, against the promoter M/s Athena Infrastructure Ltd., on account of violation of the

clause 21 of the flat buyer's agreement executed on 01.10.2011 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 01.10.2011 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 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: -

- **Nature of the project- Group housing colony**
- **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**

1.	Name and location of the project	"Indiabulls Enigma", Pawala Khusrupur Village, Sector 110, Gurugram, Haryana
2.	Project area	15.6 acres
3.	RERA Registered/ not registered.	Registered
4.	HRERA registration number	354 of 2017 dated 17.11.2017
5.	HRERA registration certificate valid upto	30.09.2018 extension applied vide dated 18.09.2018

6.	Status of tower/ project in question	Tower B under construction as admitted by the respondent
7.	Flat/unit no.	111, 11 th floor, tower B
8.	Flat measuring	3350 sq. ft.
9.	Date of execution of flat buyer's agreement-	01.10.2011
10.	Payment plan	Construction linked
11.	Total sale price as per applicant ledger dated 22.12.2018	Rs. 1,89,73,750/-
12.	Total amount paid by the complainant till date as per applicant ledger dated 22.12.2018	Rs.1,84,02,137/-
13.	Due 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. 01.10.2011)	01.04.2015
14.	Delay in handing over possession till date of decision	4 years 1 month and 15 days
15.	Penalty clause 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 complainants and the respondent. A flat buyer's agreement dated 01.10.2011 is available on record for the aforesaid flat according to which the possession of the same was to be delivered by 01.04.2015. Neither the respondent has delivered the possession of the said unit till date to the complainants nor they have paid any compensation in terms of 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 respondent appeared on 16.05.2019. The case came up for hearing on 16.05.2019. The reply filed on behalf of the respondent on 22.02.2019 has been perused.

Facts of the complaint

6. The complainants submitted that they booked a flat no. B-111, 11th floor, tower B, having approximately 3350 sq. ft. of super area in the respondent's project called "Indiabulls Enigma", situated in Pawala Khusrupur village, Sector 110, Gurugram.
7. The complainants submitted that the respondent has not inform them about all licences which has been granted from the appropriate competent authority for development of the project. The respondent collected huge amount from buyer's including them from 2011 to 2017 and kept on promising them for delivery of possession of the flat on time. They paid,

as and when demanded by the respondent, a total sum of Rs. 1,84,02,137/- for the flat. Even after delay of 3 years and 10 months, the respondent has not offered the possession of the flat to them till date.

8. The complainants submitted that they were approached by the sale representative of the company, who made huge claims about the project as the world class project. They were promised that the possession of the flat would be handed over to the buyer's by 01.04.2015. They were impressed by there oral statements and representations and ultimately were lured to pay Rs. 5,00,000/- as booking amount of the said flat.
9. The complainants submitted that flat buyer's agreement was executed on 01.10.2011 between the parties. They approached the respondent many times and pleaded for delivery of possession of their flat as per commitments made in the flat buyer's agreement to them, which was 01.04.2015. The respondent utilized funds collected from them and other buyer's for his own good in other projects, being developed by the respondent.

10. The complainants submitted that they do not intend to withdraw from the project. As per section 18 of the Act ibid, the respondent is under obligation to pay interest on the delayed possession on the amount deposited by them at the rate prescribed in the Act ibid. They reserve their right to seek compensation from the promoter for which they may make a separate application to the adjudicating officer.

Issues to be decided

11. The complainants have raised the following issues:
- i. Whether the respondent has delayed in delivery of possession of the said flat to the complainants as per terms mentioned in the flat buyer's agreement?
 - ii. Whether the respondent is liable to pay delay possession charges to the complainants?

12. **Reliefs sought:**

The complainants are seeking the following reliefs:

- i. Direct the respondent to complete the construction of the flat, along with common area facilities and handover the possession of the said flat to the complainants.

- ii. Direct the respondent to pay interest for every month of delay in offering the possession of the flat since 01.04.2015 to the complainants on amount taken from them at prescribed rate of interest.
- iii. Any other damages, interest and relief which the hon'ble authority may deem fit and proper under the circumstances of the case may kindly be passed in the favour of the complainants.

Respondent's reply

13. 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.
14. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact and law. The respondent denies them in toto. Nothing stated in the said complaint shall be deemed to be admitted by the respondent merely on account of non-transverse, unless the

same is specifically admitted herein. The instant complaint is devoid of any merits and has been preferred with the sole motive to extract monies from the respondent, hence the same is liable to be dismissed.

15. The respondent submitted that the instant complaint is outside the preview of this hon'ble authority as the complainant themselves approached the respondent and showed their interest to book unit in the project to be developed by the respondent. Thereafter, the complainant post understanding the terms and conditions of the agreement had voluntarily executed flat buyer's agreement with the respondent on 01.10.2011. As per clause 49 of the said agreement duly executed between the complainants and the respondent, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement. Thus, the complainants are contractually and statutorily barred from invoking the jurisdiction of this hon'ble authority. Moreover,

no cause of action ever arose in favour of the complainants and against the respondent.

16. The respondent submitted that the present complaint is directly contrary to the terms of the binding inter-se flat buyer's agreement dated 01.10.2011 ("agreement") entered into between the parties. It is humbly submitted that the basis of the complaint is that the respondent had delayed the possession of the unit bearing no. B111 in "**INDIABULLS ENIGMA**", New Gurgaon". However, it is submitted that the a bare perusal of clause 21 of the said agreement would reveal that the proposed period of handing over of possession under the said clause was neither "fixed" nor "cast in stone". Insofar as the time for completion of construction is concerned, the same was never meant to be the essence of the agreement. The parties had agreed that the respondent shall "endeavour" to complete the construction of the unit in question within a period of three years, with a six months grace period thereon, from the date of execution of the agreement. Therefore, any claim for compensation, whether in the nature of interest or otherwise, holding the period of three years with a six month

grace period thereon from the date of execution of the agreement, to be fixed would be contrary to the specific understanding between the parties. As such, in view of the fact that the time period mentioned in clause 21 was only a proposed period, question of delay cannot even arise in the present matter. The clause reads:

“The developer shall endeavor to complete the construction of the said building/unit within a period of three years, with a six months grace period thereon from the date of execution of these Flat Buyer’ Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to his or as demanded by the Developer...”

In view of the above fact, the time period mentioned in clause 21 was only a proposed period, hence question of delay cannot even arise in the present matter.

17. It is pertinent to mention here that from the very beginning it was in the knowledge of the complainants that there is a mechanism detailed in the FBA which covers the exigencies of inordinate delay caused in completion and handing over of the

booked unit i.e. enumerated in the **clause 22** of duly executed FBA. The clause 22 of FBA which is being reproduced hereunder for ready reference:

***“Clause 22 In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay attributable to the Buyer/force majeure / vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- (Rupees Five only) per square feet (of super area) per month for the period of delay*”**

It is thus prayed, that the complainants being aware, having knowledge and having given consent to the incorporation of the above mentioned clause, is now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are rescinding from the duly executed contract between the parties.

18. The respondent submitted that he 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. The respondent would be completing the construction of project in terms of the extension filed before the RERA Authority and would be applying for occupational certificate for the alleged tower very soon. The delay in delivering the possession of the flat is beyond the control of the respondent, since for completing a project number of permissions and sanctions are to be required from numerous government authorities which were delayed with no fault of the respondent. In addition to the problems related to labor/ raw material and government restrictions including National Green Tribunal which imposed a ban on carrying out constructions in Delhi-NCR for several months, the respondent kept on the work moving steadily. Based upon his past experiences the respondent has specifically mentioned all the above contingencies in the FBA dated 10.08.2012 and incorporated them in clause 39 of FBA.

19. The respondent submitted that the agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint, is the flat buyer agreement dated 01.10.2011, executed much prior to coming into force of the

RERA and the RERA Rules. Further the adjudication of complaint for the purpose of granting interest and compensation, as provided under sections 12, 14, 18 and 19 of RERA, has to be in reference to the agreement for sale executed in terms of said Act and said Rules and no other agreement. Where as the FBA being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainants on the basis of the new agreement to sell as per RERA.

20. The respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of '**INDIABULLS ENIGMA**' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers / customers and through loans that it has raised

from financial institutions. In spite of the fact that the real estate market has gone down badly the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project **“INDIABULLS ENIGMA”** has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers / promoters who have started the project around similar time period and have abandoned the project due to such reasons.

21. It is a respectful submission of the respondent that a bare perusal of the complaint will sufficiently elucidate that the complainants have miserably failed to make a case against the respondent. It is submitted that the complainants have merely alleged in the complaint about delay on part of the respondent in handing over of possession but have failed to substantiate the same. The fact is that the respondent have been acting in

consonance with the FBA dated 01.10.2011 duly executed and no contravention in terms of the same can be projected on the respondent. Without prejudice to the fact that there is no jurisdiction under the hon'ble authority, to disregard or amend the clauses of a binding agreement, it is submitted that in any case, any dispute regarding the clauses of an agreement, voluntarily entered into by the complainants about 8 years back, is clearly barred by limitation, hence is liable to dismissed.

22. The complainants have preferred their complaint with false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in FBA entered into between the parties. In view of the same, it is submitted that there is no cause of action in favour of the complainants to institute the present complaint.

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:

23. With respect to the **first and second issues** raised by the complainants, as per clause 21 of the flat buyer's agreement dated 01.10.2011, the possession of the unit was to be handed over within 3 years + 6 months grace period from the date of execution of agreement i.e. 01.10.2011. Accordingly, the due date of possession was 01.04.2015 and the promoter has failed to give possession by the due date. Therefore, the promoter delayed the possession of the said flat by 4 years, 1 month and 15 days till the date of decision.
24. As the possession of the flat was to be delivered by 01.04.2015, 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.
25. The promoter has failed to fulfil his obligation under section 11(4)(a), therefore, 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 offer of possession.

Findings of the authority

26. 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.
27. 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.
28. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter.

29. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act *ibid*.
30. The complainants reserves their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.
31. As per clause 21 of the flat buyer's agreement dated 1.10.2011 for unit no.111, 11th floor, in project "Indiabulls Enigma" Sector-110, Gurugram, possession was to be handed over to the complainants within a period of 36 months from the date of execution of agreement + 6 months grace period which comes out to be 01.04.2015. However, the respondent has not delivered the unit in time. Complainants have already paid Rs.1,84,02,137/- to the respondent against a total sale consideration of Rs.1,89,73,750/-. As such, complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f 01.04.2015 per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.

Decision and directions of the authority

32. 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 interest at the prescribed rate i.e. 10.65% per annum for every month of delay on the amount paid by the complainants from the due date of possession till offer of possession of the said unit by the respondent.
- (ii) The respondent is directed to pay interest accrued from 01.04.2015 till the date of decision on account of delay in handing over of possession to the complainants within 90 days from the date of order.
- (iii) Thereafter, the monthly payment of interest till offer of possession shall be paid on or before 10th of every subsequent month.
- (iv) Complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

(v) The promoter shall not charge anything from the complainant which is not part of the BBA.

(vi) Interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.65% by the promoter which is the same as is being granted to the complainants in case of delayed possession.

33. The order is pronounced.

34. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.05.2019

Judgement uploaded on 11.06.2019

HARERA
GURUGRAM