

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

**Complaint no.** : 227 of 2018  
**Date of first  
hearing** : 16.04.2019  
**Date of decision** : 07.08.2019

1. Shri Eishvinder Singh Ratra
  2. Smt. Jasbir Kaur
- Both R/o 7042 Prestige, Shantiniketan,  
Whitefield, Bengaluru, Karnatka - 560048

**Complainants**

Versus

M/s Athena Infrastructure Ltd. (through its  
Managing Director and other Directors)  
Office at: M-62 & 63, First floor,  
Connaught Place, New Delhi-110001

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE:**

Ms. Medhya Alhuwalia  
Mr. Rahul Yadav

Advocate for the complainants  
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 complainants Shri Eishvinder Singh Ratra and Smt. Jasbir Kaur, against the

Page 1 of 20

**SURBHI GARG**

LEGAL ASSISTANT

**AUTHENTICATED**  
**GURBACHAN KAUR**  
LEGAL OFFICER





promoters M/s Athena Infrastructure Ltd. (through its Managing Director and other Directors) on account of violation of clause 21 of the flat buyer's agreement executed on 18.07.2013 for unit no. G102 on 10<sup>th</sup> floor, tower 'G', admeasuring super area of 3830 sq. ft. in the project "Indiabulls Enigma" for non-fulfilment of obligations of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer's agreement has been executed on 18.07.2013, 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 are as under: -

1.	Name and location of the project	"Indiabulls Enigma" in Sector-110, Village Pawala Khusrupur, District Gurugram
2.	Nature of real estate project	Residential complex
3.	Unit no.	G102 10 <sup>th</sup> floor, tower G
4.	Project area	15.6 acres
5.	Unit area	3830 sq. ft.
6.	Registered/ not registered	<b>Registered separately</b>





		<b>in 3 phases namely: Phase I- 351 of 2017(tower G)</b>
7.	Revised date of completion as per RERA registration certificate	For reg. no. 351 of 2017- <b>31.08.2018</b>
8.	DTCP license	<b>213 of 2007, 10 of 2011 and 64 of 2012</b>
9.	Date of booking	02.07.2013 (as per applicant ledger on pg. 90 of the complaint)
10.	Date of provisional allotment letter (as per annexure 2)	16.07.2013
11.	Date of flat buyer's agreement	18.07.2013
12.	Total consideration	BSP- Rs.2,91,65,400/- (as per applicant ledger) Total cost- Rs.3,10,69,750/- (as per applicant ledger)
13.	Total amount paid by the complainants	Rs. 3,02,40,938/- (as per applicant ledger)
14.	Payment plan	Subventions Scheme till possession
15.	Due date of delivery of possession	Clause 21 – 3 years from date of execution of agreement + 6 months grace period i.e. <b>18.01.2017</b>
16.	Occupation certificate	<b>17.09.2018</b>
17.	Offer of possession	<b>31.12.2018</b>  (as per the document placed on record a Anexure-A)
18.	Delay of number of months/ years upto 31.12.2018	1 year 11 months approx
19.	Penalty clause	Clause 22- Rs. 5/- per sq. ft. per month of the super





	area
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4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainants and the respondents. A flat buyer's agreement dated 18.07.2013 is available on record for unit no. G102 10<sup>th</sup> floor tower G, admeasuring super area of 3830 sq. ft. according to which the possession of the aforesaid unit was to be delivered by 18.01.2017. However, the possession was offered by the respondent on 31.12.2018.
5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 16.04.2019, 11.07.2019 and on 07.08.2019. The reply has been filed by the respondent and the same has been perused.

**Facts of the complaint**

6. The complainants submitted that based on assurances and promises made by the respondent/promoter, they booked a flat with the respondent in the project in question. The complainants were induced to sign a pre-printed application form.





7. It is submitted that a letter of allotment dated 16.07.2013 was issued by the respondent / promoter in favour of the complainants, allotting flat no. G - 102 on 10<sup>th</sup> floor in tower - G, admeasuring super area of 3,830 sq. ft. to the complainants.
8. It is submitted that the respondent executed a pre-printed agreement dated 18.07.2013 with the complainants and confirmed the allotment of the said flat.
9. The complainants submitted that the complainants have paid a total sum of Rs. 3,02,40,938/- towards the aforesaid residential flat in the project from July, 2013 to August, 2013 as per demand of the respondent.
10. The complainants submitted that the respondent had promised to complete the project within a period of 36 months from the date of execution of the BBA with a further grace period of six months. The flat buyer's agreement was executed on 18.07.2013 and till date the construction is not complete. Furthermore, the agreement for the said flat is under a scheme of subvention till possession, according to





which the respondent has received around 95 % of the sale price within the within one month of the booking.

11. The complainants submitted that they have entered into a tripartite agreement with the respondent and the financial institution according to which it is the liability of the respondent to pay pre-EMI on the loan during the liability period i.e. till the date of issuance of offer for possession by this builder.
12. The complainants submitted that the respondent has falsely issued a final demand dated 04.12.2018/07.12.2018 vide their email. The said demand is false and baseless. The respondent has also offered possession along with the final demand. It is submitted that such offer of possession is false and malicious as the said flat is nowhere near completion. It is submitted that the respondent cannot issue a final demand unless and until the said flat is ready for handover. The project is even today not fully constructed and is not ready to be handed over to the complainants. The complainant visited the project site on 10.01.2019 along with the representatives





of the respondent. It is submitted that the following deficiencies were noted in the apartment / building:

- a. The lobby of the apartment is not completed. Work is still going on.
- b. The common areas are still under construction.
- c. The stairway is under construction and is not in a condition to be used by the residents.
- d. Work on the exteriors of the building have still not been done including finish, paint etc.

13. The complainant submitted that the project Indiabulls Enigma comprises of towers A to J. The tower D is being developed by subsidiary of Indiabulls namely Varali Properties Ltd. and whereas the other towers i.e. A to C and E to J are being developed by another subsidiary of the respondent namely Athena Infrastructure Ltd. It was presented to the complainant that towers A to D will have 17 floors. However, during the construction the respondent and Athena Infrastructure Ltd. 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/increase in FAR changed the entire theme of the

Page 7 of 20

**SURBHI GARG**

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project; it shall ultimately disturb the density of the colony and its basic design attraction; it will create an extra burden on the common amenities and facilities.

14. The complainant submitted that the respondent increased the saleable area much more than was originally represented by them, which will lead to a strain on the common facilities like open areas, car parking space, club facilities, swimming pool usage, as with an increase in population density, the ease of the use of common facilities is seriously compromised against the interest of the complainant. Moreover, the strength of the structure of tower 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 complainant submitted that the respondent did not seek his consent 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 complainant submitted that regarding increasing the



FAR, the respondent released the said change in plan in a non-descript newspaper(s) advertising. This unconscionable act is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. In this regard, it is pertinent to note that the respondent has the complete contact details including phone numbers and email ID of the complainant where it has been doing regular communication, yet the respondent never communicated any intention or actions to revise the sanctioned building plans. It is worthwhile to mention that the respondent has been sending various communications and demands, vide emails, but the respondent conveniently avoided to take approval of the complainants for the major changes in sanction plans, which has changed the fundamental nature of the project.

17. It is submitted that the complainant has made visits at the site and observed that there are serious quality issues with respect to the construction carried out by respondent till now. The flats were sold by representing that the same will be luxurious apartment. However, all such representations





seem to have been made in order to lure complainant to purchase the flats at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartments, but, they have compromised even with the basic features, designs and quality to save costs. 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.

18. The complainant 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 VAT. The complainant 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/ promoter finally on 05.08.2016 adjusted the excess amount of Rs. 3,44,700/-. The respondent did not pay any interest to the





complainant on the amount of Rs. 3,44,700/- which the respondent had illegally withheld for more than two years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax.

**19. Issues to be determined**

- I. Whether the respondent/ promoter made false representations about the project in question in order to induce the complainants to make a booking?
- II. Whether the respondent/promoter has unjustifiably delayed the construction and development of the project in question?
- III. Whether the respondent/ promoter is liable to pay the delay interest @ 18% p.a., till the time possession is handed over to the complainant?
- IV. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?

**20. Relief sought**

- I. Direct the respondent to award delay interest @ 18% p.a.





for every month of delay, till the handing over of possession of the apartment complete in all respect, to the complainant.

- II. Direct the respondent to provide the schedule of construction.
- III. Direct the respondents to pay a sum of Rs. 50,000/- to the complainant towards the cost of the litigation;
- IV. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

**Respondent's reply**

21. The respondent submitted that present complaint is not maintainable before the authority and also devoid of any merits, which has been preferred with the sole motive to harass the respondent. The instant complaint filed by the complainant before the hon'ble authority is liable to be dismissed in view of section 71 (1) of RERA Act, 2016, which specifically states that any customer/ complainant who has already filed a complaint before the ld. consumer forum/ commission(s) and is pending, in such eventuality such customer(s)/complainant(s) will have to withdraw his complaint with permission from the ld. consumer forum(s)/commission(s) to file an application before the

Page 12 of 20

**SURBHI GARG**

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adjudicating officer for adjudication of his dispute, as per the Act.

22. 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*. 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 *in limine*.
23. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e FBA dated 18.07.2013. The respondent submitted that the complainants with malafide intention have not disclosed, rather concealed the material fact from this hon'ble authority that they were always aware about the construction status being carried out at the project site, also the complainants have been a wilful defaulter since the beginning, not paying their instalments on time as per the payment plan opted by them. It is stated that the complainants have not come before this hon'ble authority with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of the RERA Act, 2016, which have been propagated for the benefit of innocent





customers and not defaulters, like the complainants in the present complaint.

24. The respondent submitted that it is only after being satisfied with the project in totality that the complainants expressed their willingness to book a unit in the project looking into the financial viability of the project and its future monetary benefits got the said unit booked with the respondent.
25. The respondent submitted that the respondent has already completed the construction of the "tower G" and have received the occupation certificate and have already offered the possession of the unit to the complainant vide letter dated 04.12.2018. That the delay in delivering the possession of the flat to the complainants were 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 labour/ 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

**SURBHI GARG**

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Page 14 of 20

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26. The respondent submitted that the agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 18.07.2013 executed much prior to coming into force of the RERA Act, 2016 and the HA-RERA Rules, 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under RERA 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 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, Act 2016.

27. The respondent submitted that 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.

28. The respondent submitted that the complainants have made 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 authority decides seriatim the issues raised by the parties as under:

29. In respect of the **first issue**, the complainant has failed to furnish any documentary proof in order to prove any false representation on the part of respondent in order to induce the complainant to make a booking.
30. In respect of the **second and third issue**, 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 agreement dated 18.07.2013, the construction was to be completed within a period of 3 years with a grace period of six months from the date of execution of the agreement. The due date of possession comes out to be 18.01.2017. Accordingly, the respondent is under an obligation to abide by the terms and conditions of the tripartite agreement executed inter-se the parties with regard to payment of pre-EMIs.
31. In respect of **fourth issue**, as per clause 18 of the flat buyer's agreement, 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





and the complainant agreed to the same. Thus, it cannot be said that the respondent has wrongfully resorted to increase in floors/FAR or has artificially inflated measurable super area. Hence, these issue is decided in negative.

32. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.
33. 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.
34. The complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.

#### **Findings of the authority**

35. **Jurisdiction of the authority-** The project "Indiabulls Enigma" is located in Sector-110, Village Pawala Khusrupur, District Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to





entertain the present complaint. The authority has complete jurisdiction to decide the complaint regarding 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.

36. As per clause 21 of the flat buyer's agreement dated 18.07.2013, for unit no. G102, 10<sup>th</sup> floor, tower-G, in project "Indiabulls Enigma", Sector-110, Gurugram, possession was to be handed over to the complainants within a period of three years months + 6 months grace period which comes out to be 18.01.2017. The project is registered with the authority and the revised date of possession undertaken by the respondent expired on 31.08.2018. The counsel for the respondent has produced a copy of occupation certificate bearing no. ZP-617/SD(BS)2018/26771 dated 17.09.2018 and has also produced a copy of offer of possession dated 31.12.2018 which have been placed on record.

37. As such, the complainant is also under an obligation under section 19(6) of the Act to abide by the terms and conditions of the agreement. Further, the respondent is also under an obligation to abide by the terms and conditions of the





tripartite agreement executed inter-se the parties with regard to payment of pre-EMIs.

**Decision and directions of the authority**


38. 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:

- (i) The complainant is directed to take possession of the offered unit within one month from the date of this order and to make balance payment, if any.
- (ii) The respondent is under an obligation to abide by the terms and conditions of the tripartite agreement executed inter-se the parties with regard to payment of pre-EMIs.

39. The complaint is disposed of accordingly.

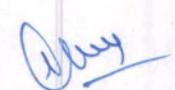
40. The order is pronounced.

41. Case file be consigned to the registry.

  
(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

  
(Subhash Chander Kush)

Member

Date: 07.08.2019

Judgement uploaded on 21.08.2019