

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

Complaint no. : 1170 of 2019  
First date of hearing : 17.07.2019  
Date of decision : 21.08.2019

Mr Rohitash Kumar Kulhar (HUF)  
S/o Sh. Bhura Ram  
R/o : H.no- 575, Sector-21, Panchkula, Haryana

**Complainant**

Versus

M/s Athena Infrastructure Ltd.  
Regd. Office: M-62 & 63, First Floor,  
Connaught Place, New Delhi-110001

**Respondent**

**CORAM:**

Shri Subhash Chander Kush  
Shri Samir Kumar

**Member  
Member**

**APPEARANCE:**

Shri Vijender Parmar

Advocate for the complainant

Shri Rahul Yadav

Advocate for the respondent

**ORDER**

1. A complaint dated 15.03.2019 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 Mr. Rohitash Kumar Kulhar (HUF) against the promoter M/s Athena Infrastructure Ltd. in respect of unit no. A104, 10<sup>th</sup> floor, tower A described below in the project 'India Bulls Enigma', Sector



110, Gurugram on account of violation of clause 21 of the flat buyer agreement dated 09.12.2011 for not handing over possession on due date which is an obligation under section 11(4)(a) of act ibid.

2. Since, the flat buyer agreement was executed on 09.12.2011 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory 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	"Indiabulls Enigma" at Sector 110, Gurgaon
2.	Nature of the project	Residential complex
3.	Current status of project	Occupation certificate received as mentioned in possession letter and possession offered vide letter dated 03.07.2018
4.	Project area	15.6 acres



5.	DTCP license	213 of 2007 dated 05.09.2007 10 of 2011 dated 29.01.2011 64 of 2012 dated 20.06.2012
6.	RERA registered/ not registered.	Registered (Phase 1A) (Phase 1) (Phase II)
7.	RERA registration no	351 of 2017 (Ph-1) 353 of 2017 dated 20.11.2017 (Ph-1A) 354 of 2017(Ph-II)
8.	Completion date as per RERA certificate	31.08.2018 for Phase 1 31.03.2018 (Ph-1A) (Expired) 30.09.2018 for phase II
9.	Apartment/unit no.	A-104, 10 <sup>th</sup> floor, Tower A
10.	Apartment measuring	3350 sq. ft super area
11.	Payment plan	Construction linked payment plan
12.	Date of execution of flat buyer agreement	09.12.2011
13.	Date of letter of allotment of flat	19.06.2012 (Annex C-2)
14.	Total consideration	Rs. 2,16,15,136/- (as per statement of account dated 20.05.2019 pg. 32 of the reply)
15.	Total amount paid by the complainant till date	Rs. 2,00,31,511/- (as per statement of account)

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		dated 20.03.2019) pg. 32 of reply
16.	Date of delivery of possession (As per clause 21 – 3 years plus 6 months grace period from the execution of flat buyer agreement i.e. 09.12.2011)	<b>09.06.2015</b>
17.	Delay in handing over possession till offer of possession i.e. 03.07.2018	<b>3 years and 24 days</b>
18.	Penalty clause (as per clause 22 of flat buyer agreement)	Rs. 5 per sq. ft. per month of the super area

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. A flat buyer agreement dated 09.12.2011 is available on record.
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 17.07.2019 and 21.08.2019. The reply filed on behalf of the respondent on 02.04.2019 and same has been pursued.

#### **Facts of the case**

1. The complainant submitted that the real estate project named “Indiabulls Enigma”, which is the subject matter of present complaint, is situated at Sector-110, Village Pawala-

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Khusrupur, Sub-Tehsil Kadipur, District Gurugram, therefore, the Hon'ble Authority do have the jurisdiction to try and decide the present complaint.

2. The complainant submitted that somewhere in the end of 2010, the respondent through its marketing executives and advertisement through various medium and means approached to him with an offer to invest and buy a flat in the proposed project of respondent, which the respondent was going to launch the project namely "**Indibulls Enigma**" in the Sector-110, Village Pawala-Khusrupur, Gurugram (hereinafter referred to as "said project"). The respondent represented to him that the respondent is a very ethical business house in the field of construction of residential and commercial project and in case he would invest in the project of respondent then they would deliver the possession of proposed flat on the assured delivery date as per the best quality assured by the respondent. The respondent had further assured him that the respondent has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time



with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to him and assured that the allotment letter and builder buyer agreement for the said project would be issued to him within one week of booking to be made by him. He while relying on the representations and warranties of the respondent and believing them to be true had agreed to the proposal of the respondent to book the residential flat in the project of respondent.

3. The complainant submitted that the respondent arranged the visit of its representatives and they also assured the same as assured by the respondent to the complainant, wherein it was categorically promised by the respondent that they already have secured all the sanctions and permissions from the concerned authorities and departments for the sale of said project and would allot the residential flat in the name of complainant immediately upon the booking. Relying upon those assurances and believing them to be true, the complainant booked a residential flat bearing no. A-104 on 10<sup>th</sup> floor in tower-A in the proposed project of the respondent

measuring approximately super area of 3350 Sq. ft. in the township to be developed by respondent. It was assured and represented to the complainant by the respondent that it had already taken the required necessary approvals and sanctions from the concerned authorities and departments to develop and complete the proposed project on the time as assured by the respondent. Accordingly, the complainant had paid Rs.5,00,000/- dated 01.10.2010 and the same was received by the respondent and receipt thereof was issued by the respondent on 01.10.2010 as booking amount.

4. The complainant submitted that the respondent assured him that it would issue the allotment letter at the earliest and maximum within one week, he will get the builder buyer agreement as a confirmation of the allotment of said residential flat in his name. However, the respondent did not fulfill its promise and assurance and has issued only the application form, despite repeated requests and reminders of the complainant to issue the allotment letter and flat buyer's agreement.

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5. The complainant submitted that in the said application form, the price of the said flat was agreed, along-with Rs.3,00,000/- as cost of car parking along-with the other charges as mentioned in the said application form. At the time of execution of the said application form, it was agreed and promised by the respondent that there shall be no change, amendment or variation or modification in the area or sale price of the said flat from the area or the price committed, assured and promised by the respondent in the said application form or agreed otherwise.
6. The complainant submitted that thereafter, the respondent started raising the demand of money /installments from him, which was duly paid by him as per agreed timelines and along-with the making of payments, complainant time and again requested the respondent to execute the flat buyer's agreement as per its promise and assurance but the respondent acting arbitrarily and negligently has refused and ignored the requests and demands of the complainant on lame excuses and deliberately and intentionally delayed the execution of the flat buyer's agreement for more than one year

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and ultimately it was executed on 09.12.2011 and later on the respondent had issued an allotment letter of dated 19.06.2012.

7. The complainant submitted that at the time of execution of the said agreement, the respondent misusing its dominant position had coerced and pressurized the complainant to sign the arbitrary, illegal and unilateral terms of the said flat buyer agreement and when the complainant had objected to those arbitrary terms and conditions of the said agreement and refused to sign the same, the respondent threatened to forfeit the amount already paid by the complainant as sale consideration in respect of the said flat and also to cancel his booking. The complainant having no other option and to found himself helpless and being cheated had under duress and coercion had signed the said flat buyer's agreement. The Respondent while taking undue advantage of its dominant position had illegally changed and increased the per sq. ft. sale price of the said flat to Rs.5,179.10/- per Sq. ft. without giving any sufficient or logical explanation for the same and refused

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to entertain any objection or request of the complainant in this regard.

8. The complainant submitted that as per the clause -21 of the said flat buyer's agreement dated 09.12.2011, the respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 3 year with a 6 months grace period thereon from the date of execution of the said flat buyer's agreement. The relevant portion of clause - 21 of the flat buyer's agreement is reproduced herein for the kind perusal of the Hon'ble Authority: -

*"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 the Flat Buyers Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit."*

However, the respondent has breached the terms of the said flat buyer agreement and failed to fulfill its obligations and has

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not delivered possession of said flat even today as on the date of filing of this compliant.

9. The complainant submitted that from the date of booking and till today, the respondent had raised various demands for the payment of installments on complainant towards the sale consideration of said flat and the complainant has duly paid and satisfied all those demands as per the flat buyers agreement without any default or delay on his part and has also fulfilled otherwise also his part of obligations as agreed in the flat buyers agreement. The complainant was and has always been ready and willing to fulfill his part of agreement, if any pending.
10. The complainant submitted that he had solely paid the entire sale consideration to the respondent for the said flat. As per the statement dated 03.08.2016, issued by the respondent, upon the request of the complainant, the complainant has already paid Rs.1,94,98,915/- towards total sale consideration as on today to the respondent as demanded time to time and

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now nothing major is pending to be paid on the part of complainant.

11. The complainant submitted that the respondent has issued receipts from the date of booking in the name of the complainant towards the payments made by him to the respondent towards sale consideration for the said flat.
12. The complainant submitted that the complainant had written several e-mails to the CEO and customer care of the respondent company regarding the arbitrary and illegal increment of the basic sale price in per square foot and objected the same vehemently. However, the respondent did not pay any heed to the request of the complainant and refused to revise the price in any manner or under any circumstances, whatsoever as agreed by it in the provisional application form. The complainant had also delivered a letter by hand in this regard to the respondent mentioning his grievances.
13. The complainant submitted that on the date agreed for the delivery of possession of said unit as per date of booking and later on according to the flat buyers agreement, the

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complainant had approached the respondent and its officers inquiring the status of delivery of possession but none had bothered to provide any satisfactory answer or reply or response to the complainant about the completion and delivery said flat. The complainant thereafter kept running from pillar to post asking for the delivery of his home but could not succeed as the construction of the said flat and said project was nowhere near to completion and still has not been completed.

14. The complainant submitted that the respondent has not completed the construction of the said Real Estate Project till now and the complainant has not been provided with the possession of the said unit despite all promises done and representation made by the respondent. By committing delay in delivering the possession of the aforesaid flat respondent has violated the terms and conditions of the flat buyer's agreement and promises made at the time of booking of said flat. The respondent has also failed to fulfill the promises and representation made to the complainant while selling the said flat to the complainant.

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15. The complainant submitted that the conduct on part of respondent regarding delay in delivery of possession of the said flat has clearly manifested that the respondent never ever had any intention to deliver the said flat on time as agreed. It has also cleared the air on the fact that all the promises made by the respondent at the time of sale of involved flat were fake and false. The respondent had made all those false, fake, wrongful and fraudulent promises just to induce the complainant to buy the said flat basis its false and frivolous promises, which the respondent never intended to fulfill. The respondent in its advertisements had represented falsely regarding the area, price, quality and the delivery date of possession and resorted to all kind of unfair trade practices while transacting with the complainant.

16. The complainant submitted that relying upon respondent's representation and believing them to be true, the complainant was induced to pay Rs.1,94,98,915/- as sale consideration of the aforesaid flat as on today.

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17. The complainant submitted that the respondent has acted in a very deficient, unfair, wrongful, fraudulent manner by not delivering the said flat situated at the project "Indiabulls Enigma" Sector-110, Village Pawala-Khusrupur, Gurugram within the timelines agreed in the flat buyer's agreement and otherwise. Thus, the respondent is liable to pay interest on account of delay caused in delivering the said unit.
18. The complainant submitted that by having intentionally and knowingly induced and having falsely misrepresenting to the complainant and thereby making them to act in accordance to its misrepresentations and owing to all the deliberate lapses /delays on the part of the respondent, the respondent is fully liable to make payment of the interest as claimed, by the complainant.
19. The complainant submitted that the cause of action accrued in favour of the complainant and against the respondent on 01.10.2010, when the complainant had booked the said flat and it further arose when respondent failed /neglected to

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deliver the said flat. The cause of action is continuing and is still subsisting on day-to-day basis.

20. That the complainant further declares that the matter regarding which this complaint has been made is not pending before any court of law and any other authority or any other tribunal on the subject matter. However, it is submitted that the complainant herein has earlier filed another complaint which was numbered as Complaint No.579 of 2018 in this subject matter which was dismissed by this Hon'ble Authority vide its order dated 13<sup>th</sup> December 2018 on a very technical ground of the Amendment application being unsigned and the same was not decided on merits hence this fresh complaint.

**Issues raised by the complainants**

The issues raised by the complainants are as follows:

- i. Whether the respondent is liable to pay the delay interest @18% per annum till the time possession is handed over to the complainants?
- ii. Whether the respondent is guilty of deficiency in services?

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- iii. Whether the document titled as "flat buyers' agreement" is one sided and unilateral?

**Reliefs sought:**

The reliefs sought by the complainants are as follows: -

- i. Direct the respondent to pay interest at the applicable rate on account of delay in offering possession on amount paid by the complainant as sale consideration of the said flat from the date of payment till the date of delivery of possession.

**Respondent's Reply**

24. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. flat buyer agreement dated 10.10.2011. It is pertinent to mention herein that the instant complaint of the complainants is further falsifying their claim from the very fact that, the complainants have filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainants with malafide intention have not disclosed, in fact concealed the material fact from this authority that the complainants have

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been a wilful defaulter since the beginning, not paying their instalments on time as per the construction link plan opted by them. It is stated that the complainants have not come before this authority with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainants in the present complaint.

25. The respondent submitted that 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 flat buyer agreement.
26. The respondent submitted that the complainants only after being satisfied with the project in totality that the complainant expressed his willingness to book a unit in the project looking into the financial viability of the project and its future

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monetary benefits got the said unit booked with the respondent.

27. The respondent also submitted that he has already completed the construction of the "tower E" and has already obtained occupation certificate for the said tower and have already initiated the procedure of handing over possession of the units of tower E to its respective buyers.

28. The respondent submitted 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. That based upon the past experiences the respondent has specifically mentioned all the above contingencies in the floor buyer agreement dated

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09.10.2011 and incorporated them in "clause 39" of FBA with the complaint by the complainants.

29. In addition to the reasons as detailed above, there was a delay in sanctioning of the permissions and sanctions from the departments, in fact as of now no proper connectivity has been provided to the project of the respondent by the Haryana government. It will also not be out of place to mention that the respondent has been diligently pursuing the matter with various authorities and hence no delay can be attributed on the part of the respondent.

30. It is pertinent to mention herein that the agreement for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 09.10.2011 was 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

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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.

31. The respondent also submitted that he 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 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

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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.

### Determination of issues

32. As regards the **first 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 09.12.2011, 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 agreement.

The relevant portion of clause - 21 of the flat buyer’s agreement is reproduced herein: -

*“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 the Flat Buyers Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit.”*

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Accordingly, the due date of possession comes out to be 09.06.2015 and the respondent offered possession on 03.07.2018, therefore the respondent is liable to pay delay interest for the period of delay. Thus, the complainants are entitled for interest on the delayed possession at the prescribed rate of 10.45% under the Act. Delay charges will accrue from the due date of possession i.e. 09.06.2015 till the date of offer of possession. i.e. 03.07.2018.

33. With respect to **second issue** raised by the complainant, the complainant has not submitted/attached any documentary proof which suffice this issue. Hence, this issue is decided negative.
34. With respect to **third issue** raised by the complainant, the complainant has only alleged in the issue, nothing has produced to prove duress and coercion, even the complainant has not pressed/raised this issue during arguments.

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

35. The authority has complete subject matter jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF***

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**Land Ltd.** As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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. As per clause 21 of the flat buyer's agreement dated 09.12.2011 for unit no. A-104, 10<sup>th</sup> floor, tower-A, in the project "Indiabulls Enigma" Sector 110, Gurugram, possession was to be handed over to the complainant within a period of 3 years plus 6 months grace period from the date of execution of the agreement i.e. 09.12.2011 which comes out to be 09.06.2015. On receipt of occupation certificate, respondent has offered the possession of the said unit on 03.07.2018. Complainant has already paid Rs. 2,00,31,511/- to the respondent against a total sale consideration of Rs. 2,16,15,136/-.

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**Decision and directions of the authority**

37. 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 respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum w.e.f. due date of possession i.e. 09.06.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession i.e. 03.07.2018
- ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.
- iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded on account of delay in offer of possession.
- iv. The promoter shall not charge anything from the complainant which is not part of the flat buyer's agreement.

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v. Respondent is at liberty to charge interest on the due payments from the complainant at the prescribed rate of interest i.e. 10.45 % which is the same as is being granted to the complainant in case of delayed possession.

36. Complaint is disposed of accordingly.

37. File be consigned to the registry.

(Samir Kumar)



(Subhash Chander Kush)



Dated: 21.08.2019

Judgement uploaded on 04.09.2019

**HARERA**  
**GURUGRAM**

**SANDEEP BHUCKAL**

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