

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

Complaint no. : 1363 of 2019
First date of hearing: 16.07.2019
Date of decision : 20.08.2019

1. Mr. Dharampal Singh Swami
2. Mrs. Sahiba Singh
Both R/o 5, Narmada Apartment,
Alaknanda, New-Delhi-110019.

Versus

Complainants

M/s. Varali Properties Ltd.
M-62 & 63 first floor, Connaught Place,
New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Smt. Amrita Sarkar
Shri Rahul Yadav

Advocate for the complainants
Advocate for the respondent

ORDER

1. A complaint dated 26.03.2019 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 complainants Mr. Dharampal Singh Swami & another against the promoter M/s Varali Properties Ltd. on account of violation of the clause 21



of the flat buyer agreement executed on 23.01.2014 in respect of unit 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 23.01.2014, 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 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 are as under: -

- i. **Nature of the project- Residential**
- ii. **DTCP license no: 213 of 2007 dated 05.09.2007, 10 of 2011 dated 29.01.2011 and 64 of 2012 dated 20.06.2012**

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| 1. | Name and location of the project | Indiabulls Enigma Sector 110, Gurugram |
| 2. | Project area | 3.256 acres |
| 3. | DTCP license no. | 213 of 2007 dated 05.09.2007 |



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| | | 10 of 2011 dated 29.01.2011 64 of 2012 dated 20.06.2012 |
| 4. | Registered/Unregistered | Registered (Phase 1A) (Phase 1) (Phase II) |
| 5. | Rera Registration number | 351 of 2017 (Ph-1) 353 of 2017 dated 20.11.2017 (Ph-1A) 354 of 2017(Ph-II) |
| 6. | Revised date of completion as per RERA registration certificate | 31.08.2018 for Phase 1 31.03.2018 (Ph-1A) (Expired) 30.09.2018 for phase II |
| 7. | Payment plan [page 55 of complaint] | Construction linked payment plan |
| 8. | Date of agreement | 23.01.2014 |
| 9. | Unit no. | D083, 8 th floor, tower-D |
| 10. | Area of unit | 3400 sq. ft. |
| 11. | Total consideration as per applicant ledger dated 15.02.2019 (page-63) | Rs. 2,28,10,616/- (including taxes) |
| 12. | Total amount paid by the complainants as per applicant ledger dated 15.02.2019 (page- 63) | Rs. 2,11,82,514/- |
| 13. | Due date of possession as per clause 21 of the said agreement - 3 years plus 6 months grace period from the execution of flat buyer's agreement i.e.23.01.2014 | 23.07.2017 7 |



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|-----|---|---|
| 14. | Penalty clause as per clause 22 of the agreement dated 23.01.2014 | Rs. 5/- per sq. ft. of the super area per month for the period of delay |
| 15. | Delay in handing over possession till date of decision 20.08.2019 | 2 years 28 days |
| 16. | Occupation certificate(annexure-A, page 26 of reply) | 17.09.2018 |

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 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 23.07.2017. Neither the respondent has delivered the possession of the said unit till date to the complainants nor they have paid any compensation @ Rs.5/- per sq. ft. per month for the period of delay as per clause 22 of flat buyer's agreement dated 23.01.2014. Therefore, the promoter has not fulfilled its 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 16.07.2019 and 20.08.2019. The reply filed on behalf of the respondent on 12.04.2019 has been perused.



FACTS OF THE CASE:

6. The complainants submitted that the representatives of Indiabulls Real Estate Ltd. represented to the complainants that it is developing the above project through its 100% subsidiary Varali Properties Ltd. It was also represented that all necessary sanctions and approvals had been obtained to complete the same within the promised time frame.
7. The complainants submitted that they were induced by the assurances and promises made by the respondent/ promoter and accordingly the complainants booked a flat with the respondent in the project in question. The respondent executed flat buyer's agreement dated 23.01.2014 and by way of aforesaid flat buyer's agreement allotted flat bearing no. D-083 on 8th floor in tower no. D admeasuring super area of approx. 3400 sq. ft. to the complainants. The complainants submitted that they had started making the payments towards the sale consideration of the booked unit from March 2012.
8. The complainants submitted that they paid a total sum of Rs. 2,11,82,514/- as against the total sale consideration of Rs.



2,28,10,616/- towards the aforesaid residential flat in the project.

9. 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 flat buyer's agreement with a further grace period of six months. The flat buyer's agreement was executed on 23.01.2014 and till date the construction is not complete. The respondent as per the relevant clause 21 of the said agreement was under an obligation to complete and handover the possession of the booked unit by 23.07.2017 (including grace period), however the respondent has failed to fulfil its most fundamental obligation.

10. The complainants submitted that they have made visits at the site and observed that there are serious quality issues with respect to the construction carried out by respondent till now. They further submitted that the respondent marketed luxury high end apartments, but 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.

11. The complainants submitted that the respondent has not provided the complainants with status of the project. The complainants are entitled for interest @ 18% p.a. for every month of delay till the possession of the flat is handed over to the complainants, complete in all respects. The original date of possession ought to be counted on expiry of three years from date of first payment.

ISSUES TO BE DECIDED:

12. The following issues have been raised by the complainants:
- 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 till the time possession is handed over to the complainants?

RELIEF SOUGHT BY THE COMPLAINANTS:

13. In view of the facts mentioned, the following reliefs have been sought by the complainants:

- i. Award delay interest for every month of delay till the handing over of possession of the flat complete in all respect to the complainant;
- ii. Direct the respondent to provide the schedule of construction;
- iii. 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.

REPLY BY THE RESPONDENT:

14. The respondent submitted that the complainants got booked a residential flat in the project of the respondent after thoroughly going through and understanding the contents of the booking application form and fully satisfying themselves of



the right and title of the respondent to develop the project. The complainant's voluntary got the unit booked in their joint name.

15. The respondent submitted that the complainants wilfully showed their interest for booking a unit in the project of the respondent and further voluntarily got executed the agreement for the said unit with respondent. Respondent denied that the execution of agreement was delayed on part of the respondent as alleged. It is submitted that the delay was purely on part of the complainants.

16. The respondent submitted that the complainants have been wilful defaulters, not paying their due instalments on time as per the agreed scheduled plan in terms of the executed agreement for the said unit, despite sending various demand letters and reminder letters to the complainant's time and again due to non-payment of their dues.

17. The respondent submitted that the flat buyer's agreement postulates that the respondent/ developer shall endeavour to complete the construction of the unit / flat / building in



question within a period of three years with a six months grace period however, the same was subject to timely payment done by the complainants as and when due in terms of the payment plan opted by the complainants. It is submitted that a bare perusal of clause 21 would reveal that the proposed period of handing over of possession under the said clause was neither fixed nor cast in stone.

18. The respondent submitted that it 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. All the allegations levied by the complainants against the respondent are baseless, false and frivolous.

19. The respondent submitted that in addition to the grounds of delay, if any, in completion of the said project and handing over of the provisional unit booked by the complainants, delay has been due to the following additional reasons also:

(a) Lack of the 150-meter-wide external road to be provided by the Government as per the sector plan/ master plan;

- (b) Lack of 24 meter wide service road as proposed in the master plan;
- (c) In fact till date the Government has not acquired the green belt and the above mention 24 meter wide road giving access/ connectivity to the entry of the project;
- (d) Delay in granting necessary/ mandatory permissions by the concerned Government departments, required for carrying on constructions at project site;
- (e) National Green Tribunal imposing a ban on carrying out constructions in Delhi-NCR for several months.

20. The respondent submitted that it has always provided the status of the project as and when enquired by the customers including the complainants. The respondent submitted that the status of construction with respect to the project is also available on the website of the respondent and same can be viewed/ accessed by its customers as well. It is submitted that the complainants have filed the instant complaint alleging that construction is not complete however, the respondent has already obtained occupational certificate for the said tower



wherein the complainants booked their unit. The respondent will be issuing possession offer to the complainants within short span of time. It is submitted that the respondent is not liable to pay any interest on the refund being claimed by the complainants. The respondent submitted that the interest of 18% compounded quarterly at which the complainants are seeking refund is exorbitant on the face of it. Secondly, as per the "clause 22" of the flat buyer's agreement, the respondent is not liable to pay any interest to the complainants.

21. The respondent has relied upon the case of Hon'ble Supreme Court in the case of Hind Construction Contractors vs. State of Maharashtra reported in (1979) 2 SCC 70 has laid down the following: -

"8.It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such



clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.”

22. The respondent submitted that if time was essence of the agreement as stipulated in clause 21. Clause 22 stipulates for penalty in circumstances when the opposite party is unable to deliver the flat in question within the time period as specified in clause 21. In such a situation clause 22 would be in direct conflict with clause 21. The respondent submitted that time was never intended by the parties to be the essence of the agreement. The respondent submitted that unlike other developers / promoters the respondent on its own has been giving the benefit of "delay penalty" to the customers as agreed @ Rs. 5/- per sq. ft. per month at the time of handing over of the possession to the complainants towards the delay. Thus, based on the above submissions complainants are not entitled for refund of its entire investment along with interest @ 18% p.a. as alleged in the instant complaint.

23. All other averments have been denied by the respondent.

DETERMINATION OF ISSUES:

24. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise
25. With respect to **first issue**, complainant has not produced evidence regarding false representations by the respondent. So, the issue is decided negative.
26. With respect to **other issues** raised by the complainants, the authority came across that as per clause 21 of the flat buyer's agreement dated 23.01.2014, the possession of the said flat was to be handed over to the complainant within a period of 36 months from the date of execution of said agreement i.e. 23.01.2014 plus 6 months grace period which comes out to be 23.07.2017. The grace period is allowed by the authority because of contingencies beyond the control of the respondent. The clause regarding the possession of the said unit is reproduced below:

"Clause 21: The developer shall endeavour to complete the construction of the said building within a period of three years, with a six months grace period from the date of



execution of flat buyers agreement subject to timely payment."

27. However, the respondent has not delivered the unit in time. Complainant has already paid Rs. 2,11,82,514/- to the respondent against a total sale consideration of Rs. 2,28,10,616/-. Accordingly, the due date of possession was 23.07.2017 and it was informed by the counsel for the respondent that they have received OC and they have already issued possession letter no. Enigma-D/D083/20190426/10/808 date 26.04.2019. As such no doubt the complainant is entitled for delayed possession charges. However, respondent is also entitled for maintenance charges which he can levy to the complainant/buyer for not taking the possession of flat/unit. As the promoter has failed to fulfil its obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso of the Act ibid read with rule 15 of the Rules ibid, to pay interest to the complainants, at the prescribed rate i.e. 10.45% per annum w.e.f. 23.07.2017 till 26.04.2019 as per the provisions of section 18(1) of the real estate (regulation and development) act, 2016.

CHIRAG NAGPAL
LEGAL ASSISTANT

FINDINGS OF THE AUTHORITY:

28. **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 dated 14.12.2017 to entertain the present complaint.
29. 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.
30. The complainants made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter under section 11(4)(a) of the Act *ibid.* The complainants requested that necessary directions be issued by



the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation.

31. as per clause 21 of the flat buyer's agreement dated 23.01.2014, the possession of the said flat was to be handed over to the complainant within a period of 36 months from the date of execution of said agreement i.e. 23.01.2014 plus 6 months grace period which comes out to be 23.07.2017. The grace period is allowed by the authority because of contingencies beyond the control of the respondent.
32. However, the respondent has not delivered the unit in time. Complainant has already paid Rs. 2,11,82,514/- to the respondent against a total sale consideration of Rs. 2,28,10,616/-. Accordingly, the due date of possession was **23.07.2017** and it was informed by the opposite counsel respondent that they have received OC and they have already issued possession letter no. Enigma-D/D083/20190426/10/808 date 26.04.2019. As such no doubt the complainant is entitled for delayed possession charges. However, respondent is also entitled for maintenance charges which he can levy to the complainant/buyer for not

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taking the possession of flat/unit. As the promoter has failed to fulfil its obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso of the Act ibid read with rule 15 of the Rules ibid, to pay interest to the complainants, at the prescribed rate i.e. 10.45% per annum w.e.f. 23.07.2017 till 26.04.2019 as per the provisions of section 18(1) of the real estate (regulation and development) act, 2016.

DECISION AND DIRECTIONS OF THE AUTHORITY:

33. 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:

- a. The respondent shall be liable to pay interest for every month of delay at prescribed rate i.e. 10.45% per annum w.e.f. 23.07.2017 till 26.04.2019 as per the provisions of section 18(1) of the real estate (regulation and development) act 2016.

- b. The interest so accrued shall be paid within 90 days from the date of decision.
- c. Complainant is directed to pay outstanding dues, if any after adjustment of interest for the delayed period.
- d. The promoter shall not charge anything from the complainant which is not part of the said agreement.
- e. Interest on the due payments from the complaint shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same is being granted to the complainant in case of delayed possession.

34. The order is pronounced.

35. Case file be consigned to the registry.

CHIEF MAGPAL
CLERK


(Samir Kumar)
Member
MEMBER
HARYANA REAL ESTATE REGULATORY
AUTHORITY GURUGRAM
सदस्य
हरियाणा भू-संपदा विनियामक
अधिकारण, गुरुग्राम


(Subhash Chander Kush)
Member
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HARYANA REAL ESTATE REGULATORY
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अधिकारण, गुरुग्राम

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.08.2019

Judgement uploaded on 04.09.2019