

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

Complaint No. : 906 of 2019
First date of hearing: 17.07.2019
Date of Decision : 21.08.2019

1. Mr. Sankar Das
2. Mrs. Rosella Das
Both R/o. B-505, NPSC Apartments, Plot no.
5, Sector-2, Dwarka - 110075.

Complainants

Versus

M/s. Athena Infrastructure Ltd.
(Through its M.D.)
Address: M-62 and 63, first floor,
Connaught Place, New Delhi-110001.

Respondent

CORAM:

Dr. K. K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

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

ORDER

1. A complaint dated 26.03.2019 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants, Mr. Sankar Das and Mrs. Rosella Das against the promoter, M/s. Athena Infrastructure Ltd., on account of violation of the clause 21 of the flat buyer's agreement executed on 24.11.2011 in respect

2. of flat no. C151, 15th floor, block/tower C, admeasuring 3,400 sq. ft. super area, in the project 'Indiabulls enigma' at Sector 110, Gurugram for not handing over possession on the due date i.e. 24.05.2015 which is an obligation of the promoter under section 11(4)(a) of the Act ibid.
3. Since the flat buyer's agreement for the flat in question has been executed on 24.11.2011 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for non-compliance of statutory obligation on the part of respondent under section 34(f) of the Act ibid.
4. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Indiabulls Enigma", sector 110, Gurugram
2.	Nature of real estate project	Residential complex
3.	Project area	15.6 acres
4.	DTCP license no.	License No. 213 of 2007 dated 05.09.2007, 64 of 2012 dated 20.06'2012 and 10 of 2011 dated 29.01.2011
5.	Flat/unit no.	C151, 15 th floor, tower C Note - Tower C is in phase II
6.	Allotted flat measuring area	3,400 sq. ft. super area
7.	RERA registered/ unregistered.	Registered vide no. 351 of 2017 (phase I) 353 of 2017 (phase 1A) 354 of 2017 (phase II)

8.	Booking date	22.08.2011 (Annx 3 Pg. 59 of the reply)
9.	Date of execution of flat buyer's agreement	24.11.2011 (Annx 2)
10.	Payment plan	Construction linked payment plan (Pg. 52 of the complaint)
11.	Total consideration as per statement of accounts dated 05.02.2019	Rs. 1,88,05,340/- (as stated by the complainant) Rs.1,80,42,340/- (Annx 3 Pg. 59 of the complaint)
12.	Total amount paid by the complainant as per SOA dated 05.02.2019	Rs.1,82,62,833/- (Annx 3 Pg. 59 of the complaint)
13.	Due date of delivery of possession as per clause 21 of flat buyer's agreement dt.24.11.2011	24.05.2015 (3 years + 6 months' grace period from the date of execution of agreement)
14.	Delay in handing over possession till 21.08.2019	4 years, two months and 28 days.
15.	Penalty clause as per flat buyer's agreement dated 24.11.2011	Clause 22 of the agreement i.e. Rs.5/- per sq. ft per month of the super area.
16.	Revised date of delivery of possession as per RERA certificate	31.08.2018 (for phase I) 31.03.2018 (for phase 1A) 30.09.2018 (for phase 2) Note - The validity of RERA registration certificate has already expired.

5. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants and the respondent. A flat buyer's agreement dated 24.11.2011 is available on record for the aforesaid flat no. C151, 15th floor in tower C of the project, according to which the possession of the same was to be delivered by

24.05.2015. Neither the respondent has delivered the possession of the said unit till now to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft. per month of the super area as per clause 22 of flat buyer's agreement dated 24.11.2011. Therefore, the promoter has not fulfilled its committed liability till date.

6. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 17.07.2019. The case came up for hearing on 17.07.2019 and 21.08.2019. The reply filed by the respondent on 12.04.2019 and the same has been perused.

Facts of the complaint: -

7. Briefly stated, the facts relevant for the disposal of the present complaint are that the complainants booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurugram.
8. The representatives of the respondent represented to the complainants that Indiabulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd. The complainants were induced to book the above flat by showing brochures and advertisements material depicting that the project will be developed as a state-of-art project and shall be

one of its kind. It was stated that the Indiabulls Enigma is a premium high-end multi-storey project being developed with the assistance of internationally renowned architects. It was also represented that all necessary sanctions and approvals had been obtained to complete the same within the promised time frame.

9. The complainants 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 agreement dated 24.11.2011 and by way of aforesaid flat buyer agreement allotted apartment bearing no. C-151 on 15th floor in Tower C, admeasuring super area of approx. 3400 sq. ft. to the complainants.
10. The complainants have paid a total sum of Rs. 1,82,62,833/- as against the total sale consideration of Rs. 1,88,05,340 towards the aforesaid residential flat in the project.
11. The respondent had promised to complete the project within a period of 36 months from the date of execution of the agreement with a further grace period of six months. The flat buyer's agreement was executed on 24.11.2011 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 24.05.2015 (including grace period), however the Respondent has failed to fulfil its most fundamental obligation.

12. The respondent has failed to complete the project in time, resulting in extreme kind of mental distress, pain and agony to the complainants.

13. The complainants 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. 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 are 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.

14. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 24.11.2011 the project was to be completed in 3 years with grace period of six months. The respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. The project has been inordinately delayed. Hence, this complaint.

Issues to be decided:-

- i. Whether the respondent made false representations about the project in question in order to induce the complainant to make a booking?
- ii. Whether the respondent has delayed the construction and development of the project in question?
- iii. Whether the respondent is liable to pay the delay interest till possession is handed over to the complainants?

Reliefs sought:-

- i. Award delay interest for every month of delay, till the handing over of possession of the apartment complete in all respect to the complainants.

- ii. Direct the respondent to provide the schedule of construction.
- iii. Direct the respondent to pay a sum of Rs. 50,000/- to the complainants towards the cost of litigation.

Respondent's reply:-

15. The respondent submitted the fact that the instant complaint is not maintainable, on facts of law, and is as such liable to be dismissed at the threshold being in wrong provisions of the law.
16. The present complaint is devoid of any merits and had been preferred with sole motive to harass the respondent. In fact, the present complaint is liable to be dismissed on the ground that the claim of the complainants is unjustified, misconceived and without any basis as against the respondent.
17. The allegations made in the instant complaint are wrong, incorrect and baseless in the fact of law. The respondent denies them in toto.
18. The present complaint is not maintainable before this authority and also devoid of any merits, which has been preferred with the sole motive to harass the respondent. Infact the complainant are guilty of suppression very and suggestion falsi and has infact concealed the true facts about their



approaching the NCDRC for the baseless grievances against the respondent and thus try to mislead this hon'ble authority.

19. As per the flat buyer agreement duly executed between the parties, it was specially 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 clause 49 of the flat buyer's agreement dated 24.11.2011, it has been mentioned that the dispute shall first go for arbitration. Hence, the present complaint is outside the purview of this authority.
20. The respondent has submitted that the relationship between the complainants and the respondent is governed by the terms of FBA dated 24.11.2011.
21. The respondent further contended that the complainants are falsifying their claim from the very fact that there has been alleged delay in delivery of possession of the booked unit however, the complainants with mala fide intention hid the fact from this hon'ble authority that they on many occasions were the defaulters in making the payment of installments.
22. 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 defaulter, like the complainants in the present complaint.

23. The complainant after being satisfied in totality 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 transferred in their joint name from the initial owner.
24. The delay in delivering the possession was beyond the control of the respondent since number of approvals have to be taken from various authorities. In addition the problem related to labour/raw material and government restrictions including the National Green Tribunal which imposed ban on the construction in Delhi- NCR for several months, the respondent kept on the work moving steadily. The complainants have made false and baseless allegations with a mischievous intention.

Determination of issues:-

25. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:
- With respect to the **issue i** raised by the complainants the complaint has failed to adduce any evidence in support of

their allegation that respondent has induced the complainants to make the booking.

- ii. With respect to the **issue ii and iii** raised by the complainant the authority came across that as per clause 21 of flat buyer's agreement dated 24.11.2011, the possession of the flat was to be handed over within 3 years plus 6 months' grace period from the date of execution of agreement. Accordingly, the due date of delivery of possession on calculation comes out to be 24.05.2015 and the possession has been delayed by 4 years, 2 months and 28 days. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the carpet area of the said flat as per clause 22 of flat buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in **para 181 of Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors.** (W.P 2737 of 2017), wherein the Bombay HC bench held that:

"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual

purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

- iii. As the possession of the flat was to be delivered by 22.05.2014 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016. Hence, the respondent is liable to pay delayed possession charges at the prescribed rate for every month of delay till the handing over of possession in terms of section 18(1) proviso of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.
- iv. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Findings of the authority: -

26. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *SimmiSikka 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 Town and 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.
28. The authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.
29. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in **civil appeal no.23512-23513 of 2017** and as provided in



Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

30. Arguments heard. The project is registered with the authority. Since the respondent has failed to deliver the possession of subject unit till date so the complainants are entitled for delayed possession charges as described herein below in the succeeding paragraphs.

Decision and directions of the Authority: -

31. 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 parties in the interest of justice and fair play:

- (i) The respondent is duty bound to pay delayed possession charges at the prevalent prescribed rate of interest i.e. 10.45% for every month of delay from the due date of possession i.e. 24.05.2015 till the date of offer of the possession as per the provision of section 18 (1) proviso of the Act read with rule 15 of

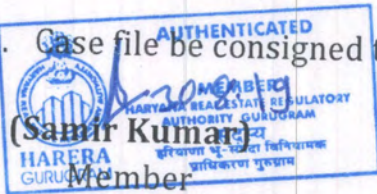
the Haryana, Real Estate (Regulation and Development) Rules, 2017.

- (ii) The arrears of interest accrued so far from due date of delivery of possession i.e. 24.05.2015 till the date of order shall be paid to the complainants within 90 days from the date of this order. Thereafter, monthly interest at the prescribed rate of 10.45% per annum be paid on or before 10th of each subsequent month.
- (iii) The complainants are directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period. Interest on the due payments from the complainants shall be charged at the prescribed rate of interest of 10.45% per annum by the promoter which is the same as is being granted to the complainant in case of delayed possession.
- (iv) The promoter shall not charge anything from the complainant which is not a part of flat buyer's agreement.



32. The order is pronounced.

33. Case file be consigned to the registry



Haryana Real Estate Regulatory Authority, Gurugram

Dated: -21.08.2019