

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

Complaint No. : 1606 of 2019
First date of hearing: 20.08.2019
Date of Decision : 20.08.2019

Mr. Bhim Sain Bajaj
R/o. House no. 56, Sector 16A,
Faridabad (Haryana) - 121002.

Complainant

Versus

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

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Ms. Amrita Sarkar
Shri Rahul Yadav

Advocate for the complainant.
Advocate for the respondent.

ORDER

1. A complaint dated 12.04.2019 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 complainant, Mr. Bhim Sain Bajaj against the respondent-promoter, M/s. Athena Infrastructure Ltd., on account of violation of the clause 21 of the flat buyer agreement executed on 10.08.2011 in respect of



flat no. H102, 10th floor, block/tower H, measuring 3830 sq. ft. super area, in the project 'Indiabulls Enigma' at Sector 110, Gurugram for not handing over possession on 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 for the flat in question has been executed on 10.08.2011 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*.
3. 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.	Flat/unit no.	H102, 10 th floor, tower H Note - Tower H is covered under phase I of RERA registration.
5.	Allotted flat measuring area	3830 sq. ft. super area
6.	RERA registered/ unregistered.	Registered vide no. 351 of 2017 (phase I) 353 of 2017 (phase 1A) 354 of 2017 (phase II)
7.	Booking date	01.04.2011 (Annx A2)
8.	Date of execution of flat buyer's agreement	10.08.2011 (Annx A1)

9.	Payment plan	Construction linked payment plan (Pg. 45 of the complaint)
10.	Total consideration as per statement of accounts dated 28.11.2018	Rs.1,88,12,490/- (Annx A2)
11.	Total amount paid by the complainant as per SOA dated 28.11.2018	Rs.1,83,20,207/- (Annx A2)
12.	Due date of delivery of possession as per flat buyer's agreement dt.10.08.2011	10.02.2015 (Clause 21: 3 years + 6 months' grace period from the date of execution of agreement)
13.	Delay in handing over possession till 20.08.2019	4 years, 6 months and 10 days.
14.	Penalty clause as per flat buyer's agreement dated 10.08.2011	Clause 22 of the agreement i.e. Rs.5/- per sq. ft per month of the super area.
15.	Status of the project	OC received on 17.09.2018 (Annx A of the reply)
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 registration validity has already expired

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 10.08.2011 is available on record for the aforesaid flat no. H102, 10th floor in tower H of the project, according to which the possession of the same was to be delivered by 10.02.2015. 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 10.08.2011. Therefore, the promoter has not fulfilled its committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent's counsel appeared on 20.08.2019. The case came up for hearing on 20.08.2019. The reply filed by the respondent on 08.05.2019 and the same has been perused.

Facts of the complaint: -

6. 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.
7. The representatives of the Indiabulls Real Estate Ltd. represented to the complainants that Indiabulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd. The complainant was 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.

8. The complainant was induced by the assurances and promises made by the respondent -promoter and accordingly the complainant booked a flat with the respondent in the project in question. The respondent executed flat buyer agreement dated 10.08.2011 and by way of aforesaid flat buyer agreement allotted apartment bearing no. H-102 on 10th floor in Tower H, admeasuring super area of approx. 3830 sq. ft. to the complainant.
9. The complainant has paid a total sum of Rs. 1,83,20,207/- towards the aforesaid residential flat in the project.
10. The complainant has stated that the subject booking was initially in the name of his Sh. Amit Bajaj but pursuant to some family understanding arrived between the complainant and his son the subject booking was transferred in the name of the complainant herein which was also confirmed by the respondent vide confirmation letter dated 28.11.2018.
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 10.08.2011 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 10.02.2015 (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 10.08.2011 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 unjustifiably delayed the construction and development of the project in question?

Reliefs sought:-

- i. 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.

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. It is submitted that the complainant is the subsequent allottee of the subject unit/flat which was initially booked in the name of one Mr. Amit Bajaj who had executed a flat buyer agreement. The subject flat was subsequently transferred in the name of complainant vide endorsement letter dated 31.10.2018.
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 is guilty of suppressio very and suggestio 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. The respondent has submitted that the relationship between the complainants and the respondent is governed by the terms of FBA dated 10.08.2011.
20. 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 hide the fact from this hon'ble authority that they on many occasions were the defaulters in making the payment of installments.
21. 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 his name. The complainant being aware of the terms and conditions of FBA is now evading himself from contractual obligations inter-alia from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is obvious that the complainant is also estopped from the duly executed contract between the parties.

22. The delay in delivering the possession was beyond the control of the respondent. It is known fact that due to adverse market conditions viz. delay due to reinitiating of the existing work orders under GST regime, by virtue of which all the bills of contractors were held between, delay due to the directions by the hon'ble Supreme Court and NGT whereby the construction activities were stopped, non-availability of drinking water for labour due to process change with the formation of GMDA, shortage of labour, raw materials etc., which continued for around 22 months, starting from February, 2015. Due to the above mentioned reasons, the project of the respondent was severely affected and it is in these above elaborated 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.
23. Apart from the above, the following circumstances also contributed to the delay in timely completion of the project:
- a. The commonwealth games were organized in Delhi in October 2010. Due to this mega event, construction of

several big projects including the construction of commonwealth games village took place in 2009 and onwards in Delhi and NCR region. This led to an extreme shortage of labour in the NCR region as most of the labour force got employed in said projects required for commonwealth games. Moreover, during the commonwealth games the labour/worker were forced to leave the NCR region for security reasons. This also led to immense shortage of labour force in the NCR region. This drastically affected the availability of labour in the NCR region which had a ripple effect and hampered the development of the complex.

- b. Moreover, due to active implementation of social scheme like National Rural Employment Guarantee Act (NREGA) and Jawaharlal Nehru National Urban Renewal Mission (JNNURM) there was a sudden shortage of labour/workforce in the real estate market as the available labour preferred to return to their respective states due to guaranteed employment by the Central/State government under NREGA and JNNURM schemes. This created further shortage of labour force in the NCR region. Also, even after successful completion of the Commonwealth games, this shortage continued for a long period of time.

- c. Due to slow pace of construction, a tremendous pressure was put on the contractors engaged to carry out various activities in the project due to which there was a dispute with the contractors resulting into foreclosure and termination of their contracts and we had to suffer huge losses which resulted in delayed timelines. Despite the best efforts, the ground realities hindered the progress of the project.
24. It is submitted that the project in question is registered with this authority and the respondent has already completed the construction of the alleged tower wherein the unit of the complainant was booked. It is further submitted that the respondent has already obtained occupation certificate on 17.09.2018 for "tower H" which is the tower in question.
25. The respondent submitted that it has been diligently pursuing the matter with various authorities and hence no delay can be attributed on the part of the respondent.

Determination of issues:-

26. After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

- i. With respect to the **issue i** raised by the complainant the complaint has failed to adduce any evidence in support of their allegation that respondent has induced the complainant to make the booking.
- ii. With respect to the **issue ii** raised by the complainant the authority came across that as per clause 21 of flat buyer's agreement dated 10.08.2011, the possession of the flat in question 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 10.02.2015 and the possession has been delayed by 4 years, 6 months and 10 days' approx. 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 10.02.2015 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: -

27. 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 *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.

28. 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.
29. Arguments heard. Project is registered with this authority. Counsel of the respondent has stated at bar that occupation certificate has been received and they shall be issuing offer of possession within a period of 10-15 days. However, complainant is entitled for delayed possession charges till offer of possession.

Decision and directions of the authority: -

30. 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 delay possession charges at the prevalent prescribed rate of interest i.e. 10.45% for every month of delay from due date of delivery of possession i.e. 10.02.2015 till 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. 10.02.2015 till the date of order shall be paid to the complainant 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 English calendar month.
- (iii) Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% p.a. by the respondent-

promoter, which is the same as is being granted to the complainant in case of delayed possession.

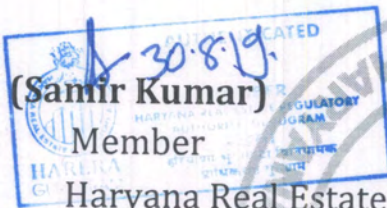
- (iv) The respondent-promoter shall not charge anything from the complainant which is not the part of flat buyer's agreement

AUTHENTICATED

GURBACHAN KAUR
LEGAL OFFICER

31. The order is pronounced.

32. Case file be consigned to the registry.



Haryana Real Estate Regulatory Authority, Gurugram

Dated: - 20.08.2019

Judgement uploaded on 30.08.2019

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