

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

Complaint No. : 369 of 2019
Date of First : 16.04.2019
Hearing :
Date of Decision : 07.08.2019

Ms. Deepa Hingorani
R/o: III-L-7, Lajpat Nagar, III, New Delhi-
110024

Complainant

Versus

M/s Athena Infrastructure Ltd.
Regd. office: M-62 & 63, first floor,
Connaught Place, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Ms. Medhya Ahluwalia
Sh. Rahul Yadav

Advocate for the complainant
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 complainant Ms. Deepa Hingorani, against the promoter M/s Athena Infrastructure Ltd



in respect of apartment/unit described below in the project 'India Bulls Enigma', Sector-110, Gurugram on account of violation of the section 11(4)(a) of the Act ibid for not developing the project within stipulated period.

2. Since, the flat buyer agreement has been executed on 07.06.2014 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 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', Sector- 110, Gurugram
2.	Nature of the project	Residential Complex
3.	RERA Registered/ Registered	Not Registered
4.	RERA Registration no.	Phase I-351 of 2017 dt. 20.11.2017 Phase IA-353 of 2017 dt. 17.11.2017 Phase II-354 of 2017 dt. 17.11.2017
5.	Revised date	Phase I-31.08.2018



		Phase IA-31.03.2018 Phase II-30.09.2018
6.	Project area	12.85 acres
7.	DTCP License no.	213 of 2007, 64 of 2012 and 10 of 2011
8.	Unit no.	B-194, 19 th floor, tower B
9.	Apartment measuring	3400 sq. ft.
10.	Payment plan	Construction linked payment plan
11.	Date of execution of buyer's agreement	07.06.2014
12.	Total consideration	Rs. 1,78,85,000/- As per applicant ledger dated 03.01.2019 , Annexure-4, page 64 of the complaint
13.	Total amount paid by the complainant till date	Rs. 1,72,94,093/- As per applicant ledger dated 03.01.2019 , Annexure-4, page 64 of the complaint
14.	Date of delivery of possession Clause 21 - 3 years plus 6-month grace period from the execution of flat buyer's agreement.	07.12.2017
15.	Penalty clause (clause 22)	Rs. 5 per sq. ft. per month of the super area per month for the period of delay.



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 complainant and the respondent. A flat buyer agreement dated 07.06.2014 is available on record for the aforementioned apartment according to which the possession of the aforesaid unit was to be delivered on 07.12.2017. The promoter has neither fulfilled his committed liability by not giving possession as per the terms of the flat buyer agreement. Neither paid any compensation i.e. Rs.5/- per sq. ft. per month for the period of delay as per flat buyer's agreement dated 07.06.2014 which is in violation of section 11(4)(a) of the Act *ibid.*

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent appeared on 16.04.2019. The case came up for hearing on 16.04.2019. The reply was filed by the respondent which has been perused.

Facts of the complaint

6. Briefly stating the facts of the complaint, the complainant booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurugram.

7. The complainant submitted that the representatives of Indiabulls Real Estate Ltd. represented to the complainant 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 submitted that the respondent transferred an already booked flat in the name of the complainant. The respondent vide letter dated 24.06.2014 intimated the complainant regarding the completion of the unit transfer process and accordingly the respondent endorsed the earlier executed allotment letter dated 12.05.2014 and the flat buyer agreement dated 07.06.2014 the respondent allotted apartment bearing no. B-194 on 19th floor in tower no. B, admeasuring super area of 3400 sq.ft. to the complainant.



9. The complainant submitted that she has paid a total sum of Rs. 1,72,94,093/- as against the total sales consideration of Rs. 1,86,83,377 towards the aforesaid residential flat in the project.

10. The complainant 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 agreement with a further grace period of six months. The flat buyer's agreement was executed on 07.12.2017 and till date the construction is not complete.

11. 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 complainants 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.

12. The complainant submitted that the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 07.06.2012 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.

13. The complainant submitted that she is entitled to delay penalty interest@ 18% on the amount deposited by the complainant from the original date of possession till the time possession is finally handed over to the complainant complete in all aspects. The original date of possession ought to be counted on expiry of three years from the date of first payment.

14. Issues raised by the complainant



- I. Whether the respondent has made false promises 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?
- III. Whether the respondent is liable to pay the delay interest @18% p.a., till the time possession is handed over to the complainant?

15. Relief sought

- I. Direct the respondent to award delay interest @18% p.a for every month of delay, till the handing over of the possession of the apartment to the complainant
- II. Direct the respondent to provide the schedule of construction.

Respondent's reply

16. 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. In fact the complainants are guilty of "Suppressio veri" and Suggestio Falsi" and has in fact concealed the true facts about their approaching the National



Consumer Dispute Redressal Commission (NCDRC) for the baseless grievances against the respondent and thus try to mislead the Hon'ble Authority. It is submitted that 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 complainant who has already filed a complaint before the Consumer Forum/ Commission and is pending, in such eventuality such complainant will have to withdraw his complaint with permission from the Id. Consumer Forum/Commission to file an application before the adjudicating officer for adjudication of his dispute, as per the Act.

17. 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*. Nothing stated in the said complaint shall be deemed to be admitted by the respondent merely on account of non-transverse, unless the same is specifically admitted herein. 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 limini*.



18. The respondent submitted that the complainant have preferred to file their complaint before the authority for adjudication of their complaint, however the same is ought to be filled before adjudicating officer as per section 71 (1) of the RERA Act, 2016. Hence it is respectfully submitted that, the instant complaint be referred to the ld. adjudicating officer and this authority may dismiss the same forthwith.

19. The respondent submitted that the relationship between the complainant and the respondent is governed by the document executed between them dated 07.06.2014. It is pertinent to mention herein that the instant complaint of the complainant is further falsifying their claim from the very fact that, the complainant have filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit.

20. The respondent submitted that with malafide intention have not disclosed, and concealed the material fact from this hon'ble authority that the complainant have 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 complainant 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 who are end-users and not defaulters, like the complainant in the present complaint.

21. The respondent submitted that it is pertinent to mention here that from the very beginning it was in the knowledge of the complainant, that there is a mechanism detailed in the agreement 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 agreement, filed by the complainant along with their complaint.

22. The respondent submitted that the complainant only after being satisfied with the project in totality expressed his 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.

23. The respondent also submitted that the respondent has already completed 95% construction of the "tower B" and will apply for grant of occupational certificate in short span of time for the said tower.

24. The respondent submitted that the delay in delivering the possession of the flat to the complainant 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. Based upon the past experiences the respondent has specifically mentioned all the above contingencies in the FBA dated 07.06.2014 and incorporated them in "Clause 39" of FBA at page 54 annexed with the complaint by the complainant.

25. The respondent submitted that 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.

26. The respondent submitted that the agreement for the purpose of getting the adjudication of the instant complaint i.e. the flat



buyer's agreement dated 07.06.2014 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 agreement being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA Act, 2016 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 complainant on the basis of the new agreement to sell as per RERA, Act 2016.

27. 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 buyers 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.

28. The respondent submitted that a bare perusal of the complaint will sufficiently elucidate that the complainant has miserably failed to make a case against the respondent. It is submitted that the complainant has merely alleged in their complaint about delay on part of the respondent in handing over of possession but have failed to substantiate the same.

29. The respondent further submitted that the complainant has 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.

Determination of issues

30. With respect to the **issue no. 1**, there are no documentary proof which can ascertain that the respondent has made false promises.

31. With respect to **issue no. 2 and 3** it is fortified from the fact that as per clause 21 of the flat buyer's agreement dated 07.06.2014, 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 07.12.2017 which has already lapsed. Thus the complainant is entitled to interest i.e 10.45% on the delayed possession at the prescribed rate under the Act. Delay charges will accrue from the due date of possession i.e. 07.12.2017 till the offer of possession. 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.

32. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter.



The complainant 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.

Findings of the authority

33. Jurisdiction of the authority- 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.* 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 Arun Kumar Gupta, Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint.

34. According to the clause 21 of the Builder Buyer Agreement dated 07.06.2014 for unit No. B-194, 19th Floor, Tower-B in the project "Indiabulls Enigma" in 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 which comes out to be 07.12.2017. However, the respondent has failed to deliver the possession of the unit in time and the complainant has already paid Rs.

1,72,94,093/- to the respondent against a total sale consideration of Rs. 1,78,85,000/-.

Decision and directions of the authority

35. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- (i) The respondent is directed to pay the delayed possession charge at prescribed rate of interest i.e. 10.45% per annum w.e.f. 7.12.2017 as per the provisions of section 18(1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.
- (ii) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of each subsequent month.
- (iii) The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.



- (iv) The respondent is directed not to charge anything from the complainant which is not part of the builder buyer agreement.
- (v) The respondent is directed to charge the interest on due payments from the complainant at the prescribed rate of 10.45%, which is the same as is being granted to the complainant in case of delayed possession.

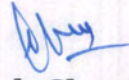
36. The complaint is disposed of accordingly.

37. The order is pronounced.

38. Case file be consigned to the registry.

39. Copy of this order be endorsed to the registration branch.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

HARERA
GURUGRAM
Haryana Real Estate Regulatory Authority, Gurugram

Date: 07.08.2019

Judgement uploaded on 30.08.2019