

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

Complaint no. : 1261 of 2019
First date of hearing 17.07.2019
Date of decision : 21.08.2019

1. Anirudh Raghuvanshi
2. Monica Raghuvanshi
R/o D 1980, Palam Vihar, Gurugram
Also at, flat no.5, no.4, Ondo Street,
Osborne Estate, Ikoyi, Lagos, Nigeria

...Complainant

Versus

M/s. Athena Infrastructure Ltd
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
Shri Rahul Yadav

Advocate for the complainant
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. Anirudh

ANAMIKA AHALAWAT
LEGAL ASSISTANT

Raghuvanshi and others against the promoter, M/s. Athena Infrastructure Ltd. on account of violation of the clause 21 of the flat buyer's agreement executed on 02.11.2011 in respect of flat 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 02.11.2011, 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: -

1.	Name and location of the project	India bulls Enigma Sector 110, Gurugram
2.	Registered/Unregistered	Registered (351 of 2017)(tower H)

ANAMIKA AHALAWAT

LEGAL ASSISTANT

AUTHENTICATED
GURBACHAN KAUR
LEGAL OFFICER



3.	Revised date of completion as per RERA registration certificate	31.08.2018 Note: This has already expired.
4.	Nature of real estate project	Residential Complex
5.	DTCP Licence no.	213 of 2007 dated 05.09.2007 10 of 2011 dated 29.01.2011 64 of 2012 dated 20.06.2012
6.	Payment plan	Construction linked plan
7.	Date of agreement	02.11.2011
8.	Unit no.	H121, 12 th floor, tower H
9.	Area of unit	3880 sq. ft.
10.	Total consideration as per statement of account dated 15.09.2016	Rs. 2,21,49,000/-
11.	Total amount paid by the complainant as alleged by the complainant	Rs.2,18,62,952 /-
12.	Due Date of Possession Clause 21 – 3 years plus 6 months grace period from the date execution of flat buyer agreement	02.05.2015
13.	Offer of possession	26.04.2019
14.	Penalty as per clause 22 of flat buyer agreement	Rs 5 per sq. ft. of the super area
15.	Delay till offer of possession	3 years 11 months 24 days
16.	Occupation certificate	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 02.05.2015. The respondent has offered the possession of the said unit on 26.04.2019 i.e. 3 years 11 months 24 days from the date the due date of possession but the respondent has not paid any compensation for delivery of possession after such a long time. Therefore, the promoter has not fulfilled his 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 17.07.2019 and 21.08.2019. The reply filed on behalf of the respondent has been perused.

FACTS OF THE CASE:

6. The complainant submitted that the Complainants booked a residential flat in the project of the Respondent namely

ANAMIKA AHALAWAT
LEGAL ASSISTANT

AUTHENTICATED
SUBBACHAN KAUR
OFFICER

“Indiabulls Enigma” at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon

7. The complainant submitted that the representatives of Indiabulls Real Estate Ltd. 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.

8. The complainant submitted that 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 transferred an already booked flat in the

name of the Complainants and subsequently issued a transfer letter dated 10.07.2012. It is pertinent to mention that the Respondent endorsed the Flat Buyer Agreement executed with the earlier buyer in the name of the Complainants in order to clarify that for the purposes of delay compensation the possession date as mentioned in the original Flat Buyer agreement shall be considered.

9. The complainant submitted that the Respondent further issued an allotment letter dated 27.08.2012 vide which the Respondent/ promoter allotted Apartment No. 121 in 'H' Block at 12th Floor, admeasuring 3880 sq.ft.
10. The complainant submitted that the Complainant has paid a total sum of Rs. 2,18,62,952/- towards the aforesaid residential flat in the Project from 2011 to 2016 as and when demanded by the Respondent. It is pertinent to state that the Respondent at stage of executing fresh documents also issued duplicate payment receipts in the name of the Complainants as the Complainants at the stage of Booking had made more than 70% of the payment.

11. 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 Builder Buyer Agreement with a further grace period of 180 days. The Flat Buyer's Agreement was executed on 02.11.2011 and till date the construction is not complete.
12. The complainant submitted that the Respondent increased the saleable area much more than was originally represented by them, which will lead to a strain on the common facilities like open areas, car parking space, club facilities, swimming pool usage, as with an increase in population density, the ease of the use of common facilities is seriously compromised against the interest of the Complainant. Moreover, the strength of the structure of Tower A to D has been compromised, the foundation designed and built for 17 floors would not withstand the additional load of 4 floors.
13. The complainant submitted that the unlawful act of increasing the FAR, the Respondent referred to an obscure notice released by the Respondent in non-descript newspaper(s) advertising the said change in plan. This unconscionable act is



clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. In this regard, it is pertinent to note that the Respondent have the complete contact details including phone numbers and email ID of the Complainant where it has been doing regular communication, yet the Respondent never communicated any intention or actions to revise the sanctioned building plans. It is worthwhile to mention that the Respondent has been sending various communications and demands, vide emails, but the Respondent conveniently avoided to take approval of the Complainant for the major changes in sanction plans, which has changed the fundamental nature of the project.

14. The complainant submitted that the respondent has illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresentation regarding claim of VAT. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax and PLC. And respondent has breached the fundamental term of the contract by inordinately delaying

in delivery of the possession. The agreement was executed on 02.11.2011 the project was to be completed in 3 years with grace period of six months. The respondent have 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.

ISSUES RAISED BY THE COMPLAINANTS:

15. The following issues have been raised by the complainant:
- I. Whether the Respondent/ promoter has unjustifiably delayed the construction and development of the project in question?
 - II. Whether the Respondent/ promoter is liable to pay the delay interest @18% p.a., w.e.f 02.05.2015 along-with compensation till the time possession is handed over to the Complainant?

III. Whether the Respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?

RELIEF SOUGHT BY THE COMPLAINANTS:

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

- a) Direct the Respondent to 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;
- b) Direct the Respondent to provide the schedule of construction;

REPLY BY THE RESPONDENT:

17. The respondent submitted that the Complainants are the subsequent Allottees of the subject unit i.e. H121, 12thFloor, Building Block no. H. It is submitted that the subject Unit was initially booked in the name of one Mr. Mahesh Aggarwal who had executed a Flat Buyer Agreement (FBA) dated 02.11.2011 with the Respondent. It is submitted that

the subject unit was subsequently transferred in the name of Complainants vide endorsement letter dated 27.08.2012 already filed by the Complainants alongwith their complaint.

18. The respondent submitted that the instant complaint filed by the Complainants is outside the purview of this Hon'ble Authority as the Complainants looking into the financial viability of the Project and its future monetary benefits willingly approached the Respondent and got the said unit transferred from its original buyer after making requisite due diligence on their own. That the Complainants further post understanding the terms & conditions of the Agreement dated 02.11.2011 got the same endorsed with the Respondent on 02.11.2011. It is submitted that as per the FBA /Agreement duly executed between the Complainants and the Respondent, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the Complainant, the same shall be adjudicated through Arbitration mechanism as detailed in the Agreement.

19. The respondent submitted that relationship between the Complainants and the Respondent is governed by the document executed between them i.e. FBA dated 02.11.2011. 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, infact concealed the material fact from this Hon'ble Authority that the Complainants has been a wilful defaulter since the beginning, not paying its due installments on time as per the Payment plan opted at the time of execution of Flat Buyer's Agreement.

20. The respondent submitted that the Complainants since inception were not diligent in timely payment of their due installments against the unit / apartment booked by him. It is pertinent to mention here that in terms of "Clause 10" of the Flat Buyer Agreement, timely payment of installments was the very essence of the Agreement and that the handing

over of the possession of the booked unit to the Complainants was subject to timely payment of dues by the Complainants in terms of the payment schedule opted by the Complainants at the time of execution of the Flat Buyer Agreement with the Respondent/ Corporate Debtor.

21. The respondent submitted that the Complainants continuously delayed the payment of dues towards the price of the booked unit inspite of several reminders and service of various Demand Notices by the Respondent for timely payment of installments by the Complainant. That there has been a substantial delay on the part of the Complainants for payment of dues towards the price of the unit and still a considerable outstanding amount is left to be cleared by the Complainants, which the Complainants are trying to escape paying, by filing the instant Complaint before the Hon'ble Authority.

22. The respondent submitted that the Complainants made a number of defaults in timely payment of the installments. Delay in ensuring the timely payment of the installments has serious repercussions on Developer's ability to deliver

the project in time. Vicious circle created by delayed payments obviously results in delay of range of development issues undertaken by the Developer / Respondent delaying the project eventually. It is submitted that the Complainants failed to observe the timely payment contemplated in Flat Buyer's Agreement ultimately resulting in alleged late offer of possession of the apartment in question.

23. The respondent submitted 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 FBA, which is at page 62 of the FBA filed by the Complainants along with their complaint.

ANAMIKA AHALAWAT

LEGAL ASSISTANT

24. The respondent submitted that the basis of the present Complaint is that there is a delay in delivery of possession of the unit in question, and therefore, interest on the deposited amount has been claimed by virtue of the present Complaint. It is further submitted that the Flat Buyer's

Agreement itself envisages the scenario of delay and the compensation thereof. Therefore, the contention that the possession was to be delivered within 3 years and 6 months of execution of the Flat Buyer's Agreement is based on a complete misreading of the agreement.

DETERMINATION OF ISSUES:

25. After considering the facts submitted by the complainants, reply by the respondents and perusal of record on file, the issue wise सत्यमेव जयते
- i. With respect to the **first and second issue** raised by the complainant, the authority came across that as per clause 21 of the apartment buyer's agreement; the possession of the said apartment was to be handed over within 3 years plus grace period of 6 months from the date of execution of apartment buyer's agreement. The agreement was executed on 02.11.2011. The grace period of 6 months has been given to the respondent due to exigencies beyond its control. Therefore, the due date of possession comes out

to be 02.05.2015. 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..”

Accordingly, the due date of possession was 02.05.2015 and the possession has been delayed by approximately 3 year 11 months 24 days till date. Thus the complainant is entitled for interest on the delayed possession at the prescribed rate under the Act. Delay charges will accrue from the due date of possession i.e. 02.05.2015 till the offer of possession.

Therefore, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f 02.05.2015 till the offer of possession i.e. 26.04.2019 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, read with rule 15 of the rules ibid.

- ii. With respect to the **third issue** raised by the complainant, the authority came across that the complainant has not produced

any specific document which defines the increase in the FAR.

Therefore, this issue will be decided at the time of proceedings.

FINDINGS OF THE AUTHORITY:

26. **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 issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

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

ANAMIKA AHALAWAT
LEGAL ASSISTANT

adjudicating officer if pursued by the complainant at a later stage.

Arguments heard.

As per clause 21 of the Builder Buyer Agreement dated 02.11.2011 for unit No. H121,12th Floor, Tower H in project "India Bills 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. 02.11.2011 which comes out to be 02.05.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs. 2,18,62,952/- to the respondent against a total sale consideration of Rs. 2,21,49,000/-. The respondent has offered the possession of the said unit on 26.4.2019. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f 02.05.2015 to 26.4.2019 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

DECISION AND DIRECTIONS OF THE AUTHORITY:

27. 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:


- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.45% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 02.05.2015 till the offer of possession i.e. 26.04.2019.
- ii. Complainant is directed to take over the possession within a period of one month on payment of outstanding dues, if any, after adjustment of interest awarded for the delayed period.
- iii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order .

iv. The promoter shall not charge anything from the complainant which is not a part of the apartment buyer's agreement.

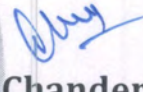
v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

28. The order is pronounced.

29. Case file be consigned to the registry.


(Samir Kumar)

Member


(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Date:21.08.2019

Judgement uploaded on 02.09.2019

ANAMIKA AHALAWAT

LEGAL ASSISTANT

AUTHENTICATED
CHIRACHAN KAUR