

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

Complaint no. : 1001 of 2019
First date of hearing: 17.07.2019
Date of decision : 21.08.2019

N.B. Constructions Pvt. Ltd.
Regd. Office: A-83, New Mandi Marg,
Kewal Park Extension, Adarsh Nagar,
New Delhi

Complainant

Versus

Athena Infrastructure Limited,
Regd. Office: M-62-63, 1st Floor, Connaught
Place, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vijender Parmar
Shri Rahul Yadav

Advocate for the complainants
Advocate for the respondent

ORDER

1. A complaint dated 07.03.2019 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 complainant N.B.

ANAMIKA AHALAWAT
LEGAL ASSISTANT

AUTHENTICATED

Page 1 of 26
GURUGRAM
LEGAL OFFICER



Construction Pvt. Ltd. as against Athena Infrastructure Ltd., on account of violation of the flat buyer agreement executed on 14.10.2011 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 14.10.2011, 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	Indiabulls Enigma Sector 110, Gurugram
2.	Project area	3.256 acres
3.	Registered/Unregistered	Registered (354 of 2017)(Tower B)

ANAMIKA AHALAWAT
LEGAL ASSISTANT

AUTHENTICATED

Page 2 of 26



4.	Revised date of completion as per RERA registration certificate	30.09.2018 Note: Applied for Extension
5.	Payment plan	Construction linked payment plan
6.	Date of agreement	14.10.2011
7.	Unit no.	B072, 7 th Floor, Tower/Block no. B
8.	Area of unit	3400 sq. ft.
9.	Basic selling price as per flat buyer's agreement	Rs. 1,35,79,974/-
10.	Total amount paid by the complainants as alleged by the complainant	Rs. 1,66,37,525/-
11.	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.14.10.2011	14.04.2015 Note: The provision related to possession are not on record but the same has been ratified by the promoter on page no.6-7 of the Reply
12.	Penalty clause as per clause 22 of the agreement dated 14.10.2011	Rs. 5/- per sq. ft. of the super area per month for the period of delay
13.	Delay in handing over possession till date of decision	4years 4 months 7 days
14.	Occupation certificate	17.09.2018

ANAMIKA AHALAWAT

LEGAL ASSISTANT

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GURBACHAN KAUR
LEGAL OFFICER

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 14.04.2015(**Note:** The provision related to possession are not on record but the same has been ratified by the promoter on page no.6-7 of the Reply).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 14.10.2011. 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 17.07.2019 and 21.08.2019.

FACTS OF THE CASE:

6. The complainants submitted that the complainant is a company incorporated under the provisions of the Companies Act, 1956

ANAMIKA AHALAWAT
LEGAL ASSISTANT

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GURBACHAN KAUR
LEGAL OFFICER

and the instant complaint is being filed through the authorized signatory of the company Sh. Ombir Singh, who has been authorized to file the present complaint vide Board Resolution dated 07.07.2018.

7. The complainants submitted that the Respondent is a Company, working in field of construction and development of residential as well as commercial projects across the country in the name of Athena Infrastructure Limited (A Indiabulls Group Company). The Real Estate Project named "Indiabulls Enigma", which is the subject matter of present complaint, is situated at Sector-110, Village Pawala-Khusrupur, Sub-Tehsil Kadipur, District Gurugram, therefore, the Hon'ble Authority do have the jurisdiction to try and decide the present Complaint.

8. The complainants submitted that the Respondent had advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality standards and agreed timelines. That the Respondent while launching and advertising any new housing project always commits and promises to the targeted consumer that their dream home will be completed and delivered to them.

ANAMIKA AHALAWAT
LEGAL ASSISTANT

AUTHENTICATED
Page 5 of 26
GURBACHAN KAUR
LEGAL OFFICER

within the time agreed initially in the agreement while selling the dwelling unit to them. They also assured to the consumers like complainant that they have secured all the necessary sanctions and approvals from the appropriate authorities for the construction and completion of the real estate project sold by them to the consumers in general.

9. The complainants submitted that somewhere in the end of 2010, the respondent through its marketing executives and advertisement through various medium and means approached the complainant with an offer to invest and buy a flat in the proposed project of Respondent, which the Respondent was going to launch the project namely "**Indiabulls Enigma**" in the Sector-110, Village Pawala-Khusrupur, Gurugram (hereinafter referred to as "Said Project"). The Respondent represented to the complainant that the Respondent is a very ethical business house in the field of construction of residential and commercial project and in case the complainant would invest in the project of Respondent then they would deliver the possession of proposed flat on the assured delivery date as per the best quality assured by the Respondent. The Respondent had further

assured to the complainant that the Respondent has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The Respondent had also shown the brochures and advertisement material of the said project to the complainant given by the Respondent and assured that the allotment letter and Builder Buyer Agreement for the said project would be issued to the complainant within one week of booking to be made by the complainant. The complainant while relying on the representations and warranties of the Respondent and believing them to be true had agreed to the proposal of the Respondent to book the residential flat in the project of Respondent.

10. The complainants submitted that Respondent arranged the visit of its representatives to the complainant and they also assured the same as assured by the Respondent to the complainant, wherein it was categorically promised by the Respondent that they already have secured all the sanctions and permissions from the concerned authorities and

ANAMIKA AHALAWAT

LEGAL ASSISTANT

Page 7 of 26

GURBACHAN KAUR
LEGAL OFFICER



departments for the sale of said project and would allot the residential flat in the name of complainant immediately upon the booking. Relying upon those assurances and believing them to be true, the complainant booked a residential flat bearing No. B-072 on 7th Floor in Tower-B in the proposed project of the Respondent measuring approximately super area of 3400 Sq. ft. (315.87 Sq. meter) and covered area of 2605.54 Sq. ft. (242.07 Sq. meter) in the township to be developed by Respondent. It was assured and represented to the complainant by the Respondent that it had already taken the required necessary approvals and sanctions from the concerned authorities and departments to develop and complete the proposed project on the time as assured by the Respondent. Accordingly the complainant had paid Rs.5,00,000/- (Rupees Five Lakh only) through cheque bearing No.812804 dated 01.10.2010 which was duly received on 01.10.2010 as booking amount and Respondent issued a receipt of dated 01.10.2010 for the same.

11. The complainants submitted that as per the Clause - 21 of the said Flat Buyer's Agreement dated 14.10.2011, the



Respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 3 year with a six (6) months grace period thereon from the date of execution of the said Flat Buyer's Agreement. The relevant portion of Clause - 21 of the Flat Buyer's Agreement is reproduced herein for the kind perusal of the Hon'ble Authority: -

"The Developer shall endeavor to complete the construction of the said building /Unit within a period of three years, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to him or as demanded by the Developer. The Developer on completion of the construction /development shall issue final call notice to the Buyer, who shall within 60 days thereof, remit all dues and take possession of the Unit."

However, the respondent has breached the terms of the said flat buyer agreement and failed to fulfill its obligations and has

ANAMIKA AHALAWAT
LEGAL ASSISTANT



not delivered possession of said flat even today as on the date of filing of this compliant.

12. The complainants submitted that the Respondent has committed grave deficiency in services by delaying the delivery of possession and false promises made at the time of sale of the said flat which amounts to unfair trade practice which is immoral as well as illegal. The Respondent has also criminally misappropriated the money paid by the complainant as sale consideration of said flat by not delivering the unit by agreed timelines. The Respondent has also acted fraudulently and arbitrarily by inducing the complainant to buy the said flat basis its false and frivolous promises and representations about the delivery timelines aforesaid housing project.

13. The complainants submitted that relying upon Respondent's representation and believing them to be true, the complainant was induced to pay Rs.1,66,37,525/- (Rupees One Crore Sixty Six Lakh Thirty Seven Thousand Five Hundred Twenty Five Only) as sale consideration of the aforesaid flat as on today.

14. The complainants submitted that the Respondent has acted in a very deficient, unfair, wrongful, fraudulent manner by not delivering the said flat situated at the project "Indiabulls Enigma" Sector-110, Village Pawala-Khusrupur, Gurugram within the timelines agreed in the Flat Buyer's Agreement and otherwise. The Respondent is therefore, liable to pay the interest on account of delay caused in delivering the possession of the said unit to the complainant.

ISSUES TO BE DECIDED:

15. The following issues have been raised by the complainants:

- i. Whether the Respondent, is guilty of unfair and fraudulent trade practice?
- ii. Whether the Respondent is guilty of deficiency in services?
- iii. Whether the document titled as "Flat Buyers Agreement" was signed by the complainants under duress and coercion?
- iv. Whether the complainant is entitled for the interest at applicable rate on the total sale consideration paid by the complainant for the said flat on account of delay in offering



possession from the date of payment till delivery of physical and vacant possession ?

v. Whether the document titled as "Flat Buyers Agreement" is one sided and unilateral?

RELIEF SOUGHT BY THE COMPLAINANTS:

16. 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. 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:

17. The respondent submitted that the relationship between the Complainant and the Respondent is governed by the document executed between them i.e. FBA dated 14.10.2011. It is pertinent to mention herein that the instant complaint of the Complainant is further falsifying its 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 however the Complainant with malafide intention have not disclosed, infact concealed the material fact from this Hon'ble Authority that the Complainant has been a wilful defaulter since the beginning, not paying its due instalments on time as per the Payment plan opted at the time of execution of Flat Buyer 's Agreement.

17. The respondent submitted that the Complainant since inception was not diligent in timely payment of his 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 Complainant was subject to timely payment of dues by the Complainant in terms of the payment schedule opted by the Complainant at the time of execution of the Flat Buyer Agreement with the Respondent/ Corporate Debtor.

18. The respondent submitted that timely payment of the installments being essence of the contract was duly agreed to by and between the parties in the Flat Buyer's Agreement dated 14.10.2011 However, the Complainant 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/ Respondent 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 delaying the project eventually. It is submitted that the Complainant failed to observe the timely payment contemplated in Flat Buyer's Agreement and hence, cannot take advantage of his own wrongs doings.

19. The respondent submitted that the Complainant 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

ANAMIKA AHALAWAT
LEGAL ASSISTANT

Page 14 of 26
AUTHENTICATED
GURBACHAN KAUR
LEGAL OFFICER



project eventually. It is submitted that the Complainant 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.

20. The respondent submitted that the present Complaint is not maintainable and the period of delivery as defined in Clause 21 of Flat Buyer's Agreement is not sacrosanct as in the said clause it is clearly stated that "the Developer shall endeavour to complete the construction of the said building/unit" within the stipulated time. Clause 21 of the said agreement has been given a selective reading by the Complainant even though he conveniently relies on same. The clause reads:

"The developer shall endeavor to complete the construction of the said building/unit within a period of three years, with a six months grace period thereon from the date of execution of these Flat Buyer' Agreement subject to timely payment by the Buyer(s) of Total Sale Price payable according to the Payment Plan applicable to his or as demanded by the Developer..."



The reading of the said clause clearly shows that the delivery of the unit / apartment in question was subject to timely payment of the installments towards the Basic Sale Price. As shown in the preceding paras it is clear that the Complainant has failed in observing his part of liability of the said clause.

19. The respondent submitted it is a universally 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 National Green Tribunal whereby the construction activities were stopped, Non-availability of the water required for the construction of the project work & non-availability of drinking water for labour due to process change from issuance of HUDA slips for the water to totally online process 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 circumstances, which were beyond the control of

ANAMIKA AHALAWAT

LEGAL ASSISTANT

the Respondent, that the progress and construction activities, sale of various flats and spaces has not taken place as envisaged.

20. The respondent submitted that Furthermore, the Ministry of Environment and Forest (hereinafter referred to as the "MoEF") and the Ministry of Mines (hereinafter referred to as the "MoM") had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of Kiln which is the most basic ingredient in the construction activity. The MoEF restricted the excavation of top soil for the manufacture of bricks and further directed that no manufacturing of clay bricks or tiles or blocks can be done within a radius of 50 (fifty) Kilometres from coal and lignite based thermal power plants without mixing at least 25% of ash with soil. The shortage of bricks in the region and the resultant non-availability of raw materials required in the construction of the Project also affected the timely schedule of construction of the Project.

21. The respondent submitted that the project of the Respondent i.e., Indiabulls Enigma, which is being developed in an area of

around 19.856 acres of land, in which the Applicant has invested its money is an on-going project and is registered under The Real Estate (Regulation and Development) Act, 2016. It is pertinent to note that the Respondent has already completed the construction of the Phase -1 and Phase 1A comprising of Towers no. A, D, E, F, G, H, I and J of the project. It is pertinent to mention herein that by way of the registration, the subject Tower-B of the project of the Corporate Debtor was initially granted till 30th September 2018, however, the Respondent vide its letter dated 18.09.2018 had already applied for the extension of the said registration for Tower B under Rule 6 of RERA Rules, 2017. That the Respondent has already paid the requisite fees for the extension of the registration under RERA Act, 2016.

22. The respondent submitted that the Construction of Tower is in advanced stage of completion and will be applying for the Occupational Certificate for the said Tower very soon. It is further submitted that the delay what so ever was in the knowledge of the Complainant who were following up the development with respect to the construction being carried

ANAMIKA AHALAWAT
LEGAL ASSISTANT



out at the project site. It is submitted that the Complainant was well aware that for starting the construction various permissions are required to be taken from the competent authority one after the other and all these facts have been duly mentioned in the FBA. However, it is submitted that the delay in completion of the project as alleged in the instant complaint is not due any fault attributable to the Respondent since the events led to such delay have been beyond the control of the Respondent. It is admitted that the Respondent had all necessary sanctions and approvals for the construction in question. It is pertinent to mention herein that the Respondent being a customer oriented Company is voluntarily and willingly giving discounts to customers towards delay in handing over of possession strictly in accordance with the terms and conditions of the FBA at the time of handing over the possession of the booked Unit. It is correct that as per FBA, the possession of the unit was to be delivered within 42 months and the construction of the unit was also at the verge of its completion as per the terms and conditions of the agreement, however, due to some unforeseen circumstances

which were beyond the control of the respondent, the same could not be completed.

DETERMINATION OF ISSUES:

23. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise

24. With respect to **first, second and third issue** raised by the complainants, there is no iota of evidence produced on record thus this issue cannot be decided.

25. With respect to the **fourth and fifth issues** raised by the complainants, the authority came across that as per clause 21 of the flat buyer's agreement, the possession of the said flat was to be handed over within 3 years plus grace period of 6 months from the date of execution of flat buyer's agreement. The agreement was executed on 14.10.2011. Therefore, the due date of possession shall be computed from 14.10.2011. The grace period is allowed by the authority because of contingencies beyond the control of the respondent. The

ANAMIKA AHALAWAT
LEGAL ASSISTANT



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 **14.04.2015** and the possession has been delayed by 4 years 4 months 7 days till date of decision. 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, for every month of delay till the offer of possession. 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 others. (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."

26. Further, the respondent has admitted at page no.26 of the reply submitted by him, that the construction of the said tower is complete and has also obtained an occupation certificate for the same and will initiate the process of handing over possession of the units of the said tower. The clause regarding delay in offer of possession is reproduced as below:

"Clause 22:In the eventuality of Developer failing to offer the possession of the Unit to the Buyers within the time as stipulated herein, except for the delay attributable to the buyer/force majeure/vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs.5/- per square ft. per month for the period of delay....."

FINDINGS OF THE AUTHORITY:

27. **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

ANAMIKA AHALAWAT
LEGAL ASSISTANT



notification no.1/92/2017-1TCP dated 14.12.2017 to entertain the present complaint.

28. 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.

29. 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.

Arguments heard.

As per clause 21 of the Builder Buyer Agreement dated 23.01.2014 for unit No. B072, 7th Floor, Tower/Block B in project "India Bulls Enigma" Sector 110, Gurugram, possession was to be handed over to the complainant within a period of

ANAMIKA AHALAWAT
LEGAL ASSISTANT



3 years plus six months grace period the date of execution of the agreement i.e. 23.01.2014 which comes out to be 14.4.2015. However, the respondent has not delivered the unit in time. Occupation certificate has been received on 17.9.2018. Complainant has already paid Rs.1,66,37,525/- to the respondent. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f. 14.04.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession. The respondent is directed to hand over the possession of the unit to the complainant within a period of one month.

DECISION AND DIRECTIONS OF THE AUTHORITY:

30. 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:

ANAMIKA AHALAWAT
LEGAL ASSISTANT

AUTHENTICATED
Page 24 of 26
GURBACHAN KAUR
LEGAL OFFICER



- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.45% for every month of delay from the due date of possession i.e. 14.04.2015 till the offer of possession .
- ii. Complainant is directed to pay 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 and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.
- iv. The promoter shall not charge anything from the complainant which is not a part of the flat 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

ANAMIKA AHALAWAT

LEGAL ASSISTANT

AUTHENTICATED

GURBACHAN KAUR
LEGAL ASSISTANT

granted to the complainant in case of delayed possession.

31. The order is pronounced.
32. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.08.2019

Judgement uploaded on 03.09.2019



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