

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

**Complaint No.** : 999 of 2019  
**Date of First  
Hearing** : 17.07.2019  
**Date of Decision** : 21.08.2019

1. Mehar Singh
2. Lakhpat Singh

Both R/o:- House No. 1010-P, Sector-40,  
Gurugram, Haryana

**Complainants**

Versus

Athena Infrastructure Limited  
Regd. Off.:- 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 complainant  
Advocate for respondent

**BRIEF**

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 complainants Mrs. Mehar



Singh and Mr. Lakhpat Singh, against the promoter Athena Infrastructure Limited in respect of plot/unit described below in the project 'Indiabulls Enigma', on account of violation of the section 3 of the Act *ibid*.

2. Since, the sale deed 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.	Nature of the project	Residential complex
3.	Area of the project	15.6 acres
4.	Unit no.	A-061, 6 <sup>th</sup> Floor, Tower A
5.	Area of the said unit	3400 sq. ft.
6.	DTCP License No.	213 of 2007 dated 05.09.2007  10 of 2011 dated 29.01.2011  64 of 2012 dated 20.06.2012
7.	Registered/ un registered	Registered



8.	RERA registration certificate	Phase I-351 of 2017 Phase IA-353 of 2017 Phase II-354 of 2017
9.	RERA registration certificate valid upto	Phase I-31.08.2018 Phase IA-31.03.2018 Phase II-30.09.2018 Note: this has already expired
10.	Date of execution of flat buyer agreement	14.10.2011
11.	Total consideration amount as per the SOA in letter dated 03.07.2018 annexed as Annexure 1 on pg. 27 of the reply filed by the respondent	Rs. 2,18,65,972/-
12.	Total amount paid by the complainant as per the SOA in letter dated 03.07.2018 annexed as Annexure 1 on pg. 27 of the reply filed by the respondent	Rs. 2,03,09,158/-
13.	Payment Plan	Construction Linked Plan
14.	Due date of delivery of possession as per the clause 21 of the flat buyer agreement-within 3 years from the date of execution of agreement along with a grace period of 6 months	14.04.2015
15.	Offer of possession Vide letter dated 03.07.2018 annexed as Annexure 1 on pg. 27	03.07.2018



	of the reply filed by the respondent	
16.	Delay in handing over the possession till offer of possession i.e. 03.07.2018	3 years 2 months 19 days
17.	Penalty as per clause 22 of the builder buyer's agreement dated 14.10.2011	Rs. 5/- per sq. ft. 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 complainants and the respondent. A flat buyer agreement dated 14.10.2011 is available on record for the aforementioned apartment according to which the possession of the same was to be delivered by 14.04.2015.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent appeared on 17.07.2019. The reply on behalf of the respondent was filed on 29.03.2019 has been perused by the authority.

#### **FACTS OF THE COMPLAINT**

6. Briefly stating the facts of the complaint, 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 timeline. It has been submitted that somewhere in the end of 2010, the respondent through its marketing executives and advertisements through various medium and means approached the complainants, with an offer to invest and buy a flat in the proposed project of the respondent, which the respondent was going to launch the project "Indiabulls Enigma" in the Sector-110, Vil. Pawala Khusrupur, Gurugram (hereinafter referred as "Said Project").

7. The complainants submitted that the respondent had further assured to the complainants that they had already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of the 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 complainants and assured that the allotment letter and builder buyer agreement for the said project would be issued to the complainants within one week of booking to be made by the complainants.

8. The complainants submitted that relying upon the assurances and believing them to be true, complainants booked a residential flat bearing No. A061 on 6<sup>th</sup> Floor in Tower A in the proposed project of the respondent measuring approx. super area of 3400 sq. ft. (315.87 Sq. mts.) and covered area of 2605.54 Sq. ft. (242.07 Sq. mts.) in the township to be developed by the respondent.
9. It has been submitted that the complainants have paid Rs. 5,00,000/- through cheque bearing No. 658212 dated 01.10.2010 as booking amount and respondent had issued a receipt dated 15.11.2010 for the same.
10. The complainants submitted that the respondent had assured that the allotment letter would be issued at the earliest and the complainants will get the flat buyer agreement as a confirmation of the allotment within a week. However, despite various requests made by the complainants the respondent issued only the application form on 02.02.2011.
11. The complainants submitted that according to the said application form the price of the said flat was agreed at the rate of Rs. 5000/- per Sq. ft. along with Rs. 6,00,000/- as the cost of car parking and Rs. 300/- per sq. ft. as PLC along with the other charges as mentioned in the said application form. At



the time of execution of the said application form it was assured by the respondent that there will be no change, amendment or variation in the area or the sale price of the said flat.

12. The complainants submitted that the respondent started raising the demand of money/instalments from the complainants, which was duly paid by them as per agreed timelines and along with the making of payments the complainants time to time requested the respondent to execute the flat buyer's agreement as per its promise and assurance but the respondent acting arbitrarily and negligently have refused and ignored the requests and demands of the complainants on lame excuses and intentionally delayed the execution of the flat buyer's agreement for more than one year and ultimately it was executed on 14.10.2011.

13. It has been submitted that at the time of the execution of the said agreement, the respondent misused its dominant position in coercing and pressurising the complainants to sign the arbitrary, illegal and unilateral terms of the said flat buyer's agreement and when the complainants objected to those arbitrary terms and conditions of the said agreement and

refused to sign the same, the respondent threatened to forfeit the money already paid by the complainants as the sale consideration in respect of the said flat and also to cancel their booking. The complainants also submitted that the respondent while taking undue advantage of their dominant position had illegally changed and increased the per sq. ft. sale price of the said flat from Rs. 5,000/- per sq. ft. to Rs. 5,176.47 per Sq. ft. without giving any sufficient or logical explanation for the same and refused to entertain any objection or request of the complainants in this regard.

14. The complainants submitted that as per the clause 21 of the said agreement dated 14.10.2011, the respondent had agreed and promised to complete the construction of the said flat and deliver its possession within a period of 3 years along with a grace period of 6 months from the date of execution of the said agreement.

15. The complainants submitted that severally and jointly they have paid the entire sale consideration to the respondent for the said flat. As per the statement dated 26.06.2018, issued by the respondent, upon the request of the complainants, the complainants already paid Rs. 1,97,68,612/- towards total sale





consideration as on today to the respondent and now nothing major is pending to be paid on the part of complainants.

16. The complainants submitted that on the date agreed for the delivery of the possession of the said unit as per the flat buyer agreement, the complainants approached the respondent and its officers inquiring for the status of the delivery of possession but none had bothered to provide any satisfactory answer to the complainants about the completion and delivery of the said flat.

17. It has been submitted that the respondent vide letter dated 27.11.2018 has asked for certain documents for the registration of the said flat along with the maintenance charges in respect of the said unit with a delay of approx. 47 months and by committing delay in delivering of the possession the respondent has violated the terms and conditions of the flat buyer agreement and promises made at the time of booking of said flat.

18. The complainants submitted that the cause of action occurred in favour of the complainants and against the respondent on 01.10.2010 when the complainants had booked the said flat and it further arose when respondent failed to deliver the said flat.



19. The complainants further submitted that the matter regarding which this complaint has been made is not pending before any court of law and any other authority or any other tribunal on the subject matter. It is also submitted that the complainants herein have earlier filed a complaint which was numbered as Complaint No. 581 of 2018 in this subject matter and the same was dismissed by this Hon'ble Authority vide its order dated 13.12.2018.

### **ISSUES RAISED BY THE COMPLAINANTS**

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

- I. Whether the complainants are entitled for the interest at applicable rate on the total sale consideration paid by the complainants for the said flat on account of delay in offering possession from the date of payment till delivery of physical and vacant possession?
- II. Whether the document titled as "flat buyer agreement" is one sided and unilateral?

### **RELIEF SOUGHT**

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



- I. Direct the respondent to pay interest at the applicable rate on account of delay in offering possession on Rs. 1,97,68,612/- paid by the complainants as sale consideration of the said flat from the date of payment till date of delivery of possession.
- II. Pass such further order or direction which this Hon'ble Authority may deem fit and proper considering the facts and circumstances of the present complaint.

**REPLY BY THE RESPONDNET**

22. At the outset, the respondent most respectfully submitted that the instant complaint filed by the complainants is not maintainable, on facts or in law, and is as such liable to be dismissed/ rejected at the thresh hold, being filed in the wrong provisions of the law.
23. The present complaint is devoid of any merits and has been preferred with the sole motive to harass the respondent. In fact the present complaint is liable to be dismissed on the ground that the said claim of the complainants is unjustified, misconceived and without any basis as against the respondent. The present complaint is baseless and flagrant abuse of process of law to harass the respondent.



24. 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*.

25. The instant complaint filed by the complainants is outside the preview of this hon'ble authority as the complainants themselves approached the respondent and showed their interest to book unit in the project to be developed by the respondent. Thereafter, the complainants post understanding the terms and conditions of the agreement had voluntarily executed flat buyer agreement (hereinafter referred as "FBA") with the respondent on 14.10.2011. The respondent submitted that as per the FBA 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 complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement. The respondent craves leave of this hon'ble authority to refer and rely upon the clause no. 49 of the duly executed FBA.



26. The respondent respectfully submitted that the relationship between the complainants 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 complainants is further falsifying its 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 has not disclosed infact concealed the material fact from this hon'ble authority that the complainants have been a willful defaulter since the beginning, not paying their due installments on time as per the payment plan opted at the time of execution of flat buyer's 's agreement.

27. The respondent submitted that the complainants continuously delayed the payment of dues towards the price of the booked unit in spite of several reminders and service of various demand notices by the respondent for timely payment of installments by the complainants. 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.



28. 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. The respondent 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 flat in question.
29. The respondent stated that the complainants 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, which have been propagated for the benefit of innocent customers who are end-users and not defaulters like the complainants in the present complaint.
30. It is pertinent to mention here 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 43 of the FBA filed by the complainants along with their complaint.
31. It is thus prayed that the complainants being aware, having knowledge and having given consent to the incorporation of



the above mentioned clause, are now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are rescinding from the duly executed contract between the parties.

32. It is submitted that it is only after being satisfied with the project in totality that the complainants 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 booked with the respondent.
33. It is 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 endeavor to complete the construction of the said building/unit within the stipulated time."
34. The reading of the said clause clearly shows that the delivery of the unit/flat 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 complainants have failed in observing their part of liability of the said clause.
35. It is 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 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 agreement is based on a complete misreading of the agreement.

36. A bare perusal of clause 22 of the agreement would make it evident that in the event of the respondent failing to offer possession within the proposed timelines then in such a scenario, the respondent would pay a penalty of Rs.5/- per sq. ft. per month as compensation for the period of such delay. The aforesaid prayer is completely contrary to the terms of the inter-se agreement between the parties. The said agreement fully envisages delay and provides for consequences thereof in the form of compensation to the complainants.

37. The complainants being aware, having knowledge and having given consent of the above-mentioned clause/terms of flat buyer's agreement, 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 thus obvious that the complainants are also estopped from the duly executed contract between the parties.

38. It is stated 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 labor due to process change from issuance of HUDA slips for the water to totally online process with the formation of GMDA, shortage of labor, 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 the respondent, that the progress and construction activities, sale of various flats and spaces has not taken place as envisaged.

39. Further, as per the license to develop the project, external development charges were paid to the state government and the state government in lieu of the EDCs was supposed to lay the whole infrastructure in the licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. The state government terribly failed to provide the basic amenities due to which the construction progress of the project was badly hit.

40. It is pertinent to mention 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 tower G, wherein the complainants booked the unit in question. It is pertinent to mention herein that the respondent has already offered possession of the unit on 03.07.2018, however it is the complainants who are not taking the possession of the same.

41. 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 part of the respondent.

42. The respondent submitted that it 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/customers 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 in comparison to other real estate developers/promoters who have started the project around similar time period and have abandoned the project due to such reasons.

43. A bare perusal of the complaint will sufficiently elucidate that the complainants have miserably failed to make a case against the respondent. The respondent submitted that the complainants have merely alleged in their complaint about delay on part of the respondent in handing over of possession but have failed to substantiate the same. The fact is that the respondent, has been acting in consonance with the FBA dated 14.10.2011 executed and no contravention in terms of the same can be projected on the respondent.

44. The complainants have made false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in FBA entered between the parties. In view of the same, it is submitted that there is no cause of action in favor of the complainants to institute the present complaint.



### DETERMINATION OF ISSUES

45. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise determination are as follows:

- I. With respect to the **first issue** raised by the complainants, the authority came across that as per the clause 21 of the flat buyer agreement dated 14.10.2011 for unit No. A-061, 6<sup>th</sup> Floor, Tower-A in project "Indiabulls Enigma", the possession was to be handed over to the complainants within a period of 3 years along with a grace period of 6 months from the date of execution of the said agreement i.e. 14.10.2011 which comes out to be 14.04.2015. however, the respondent has not delivered the unit in time, Complainant has already paid Rs. 2,03,09,158/- to the respondent against a total sale consideration of Rs. 2,18,65,972/-. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest of 10.45% per annum w.e.f. 14.04.2015 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 to be read with rule 15 of the Rules 2017 *ibid.* till offer of possession. The respondent has already



offered the possession of the unit vide letter dated 03.07.2018, hence the complainants are directed to take over the possession of the unit within a period of one month.

II. With respect to the **second issue** raised by the complainants, the authority is of the view, that according to the flat buyer agreement dated 14.10.2011, the due date of possession was 14.04.2015 and the possession was offered on 03.07.2018, which has been delayed by 3 years 2 months and 19 days till the date of decision. The delay compensation payable by the respondent @Rs. 5/- per sq. ft. per month of the super area of the unit for the period of delay beyond 3 years along with a grace period of 6 months from the execution of flat buyer agreement as per clause 21 of the said 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 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."*

#### **FINDINGS OF THE AUTHORITY**

46. 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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. 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.

47. The complainants made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter under section 11 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 obligations.

48. 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.

49. 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.

50. As per the clause 21 of the flat buyer agreement dated 14.10.2011 for unit No. A-061, 6<sup>th</sup> Floor, Tower-A in project "Indiabulls Enigma", the possession was to be handed over to the complainants within a period of 3 years along with a grace period of 6 months from the date of execution of the said agreement i.e. 14.10.2011 which comes out to be 14.04.2015. However, the respondent has not delivered the unit in time, Complainant has already paid Rs. 2,03,09,158/- to the respondent against a total sale consideration of Rs. 2,18,65,972/-. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest of 10.45% per annum w.e.f. 14.04.2015 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession. The respondent has already offered the possession of the unit vide letter dated 03.07.2018,



hence the complainants are directed to take over the possession of the unit within a period of one month.

### DECISION AND DIRECTIONS OF THE AUTHORITY

51. 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:

- a. 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 complainants.
- b. The respondent is directed to pay the arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.
- c. The complainants are directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period.
- d. The promoter shall not charge anything from the complainant which is not a part of the BBA.

52. The complaint stands disposed of.

53. The order is pronounced.




**HARERA**  
**GURUGRAM**

Complaint No. 999 of 2019

54. 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 03.09.2019