

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

**Complaint no. : 918 of 2019**  
**First date of hearing: 17.07.2019**  
**Date of decision : 21.08.2019**

1. Mr. Yagvendra Chaturvedi
2. Mrs. Vineeta Chaturvedi  
Both R/o B-78, Ground floor, Sector 54,  
Sun City Projects, Gurugram: 122003.

**..Complainants**

**Versus**

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

**..Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Ms. Medha Ahluwalia  
Shri Rahul Yadav

Advocate for the complainants  
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. Yagvendra Chaturvedi and Mrs. Vineeta Chaturvedi, against the promoter M/s Athena Infrastructure Ltd., on account of violation of the clause 21 of the flat buyer's agreement

executed on 16.01.2012 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 16.01.2012, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligations on 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.	Nature of project	Group housing colony
3.	Status of project	OC received dated 17.09.2018 (page 24 of reply)
4.	DTCP license no.	213 of 2007 dated 05.09.2007, 10 of 2011 dated 29.01.2011 64 of 2012 dated 20.06.2012
5.	Registered/Unregistered	Registered Phase 1-351 of 2017 Phase 2- 354 of 2017

		dated 30.09.2018
6.	RERA registration certificate valid up to	31.08.2018
7.	Payment plan	Construction linked
8.	Date of execution of flat buyer's agreement	16.01.2012
9.	Unit no.	G091, 9 <sup>th</sup> floor, tower G
10.	Area of unit	3880 sq. ft.
11.	Total consideration as per applicant ledger dated 06.02.2019	Rs. 2,49,83,139/-
12.	Total amount paid by the complainants as per applicant ledger dated 06.02.2019	Rs. 2,38,95,946/-
13.	Due date of possession as per clause 21 of flat buyer's agreement- within 3 years plus 6 months grace period from the execution of flat buyer's agreement	16.07.2015
14.	Penalty to be paid by developer for delay caused as per clause 22 of the flat buyer's agreement	Rs. 5/- per sq. ft. per month of the period of delay
15.	Delay in handing over possession till date of offer of possession i.e. 06.02.2019	3 years 6 months 21 days
16.	Offer of possession	06.02.2019

4. Details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A flat buyer's agreement dated 16.01.2012 is available on record for the aforesaid flat according to which the possession of the same

was to be delivered by 16.07.2015. The respondent has failed to pay interest for the period it delayed in handing over possession of the subject unit by the due date. 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. Accordingly, the case came up for hearing on 17.07.2019, 21.08.2019. The reply on behalf of the respondent was filed on 18.04.2019 has been perused by the authority.

**FACTS OF THE CASE:**

6. The complainants booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurugram. 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.
7. The complainants were induced by the assurances and promises made by the respondent/promoter and accordingly they booked a flat with the respondent in the project in question. The respondent executed flat buyer's agreement dated 16.01.2012 and by way of aforesaid flat buyer's agreement, allotted flat bearing no. G-091 on 09<sup>th</sup> floor in tower/ block no. G, admeasuring super area of approx. 3880 sq. ft. to the complainants.



8. The complainants have paid a total sum of Rs. 2,38,95,946/- as against the total sale consideration of Rs. 2,49,83,139/- towards the aforesaid residential flat in the project.
9. The respondent had promised to complete the project within a period of 36 months from the date of execution of the flat buyer's agreement with a further grace period of six months. The flat buyer's agreement was executed on 16.01.2012 and till date the construction is not complete. The respondent as per the relevant clause 21 of the said agreement was under an obligation to complete and handover the possession of the booked unit by 16.07.2015 (including grace period). However, the respondent has failed to fulfil its most fundamental obligation.
10. The respondent has failed to complete the project in time, resulting in extreme kind of mental distress, pain and agony to the complainants.
11. The complainants 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 flats. 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 misselling. There are various deviations from the initial representations.



12. The respondent marketed luxury high end flats, 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.
13. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 16.01.2012 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.
14. The respondent has not provided the complainants with status of the project. The complainants are entitled for interest @ 18% p.a. for every month of delay till the possession of the flat is handed over to the complainant, complete in all respects. The original date of possession ought to be counted on expiry of three years from date of first payment.

**ISSUES RAISED BY THE COMPLAINANTS:**

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

- i. Whether the respondent has unjustifiably delayed the construction and development of the project in question?
- ii. Whether the respondent is liable to pay the delay interest till the time possession is handed over to the complainants?
- iii. Whether the respondent made false representations about the project in question to induce the complainants to make the booking?

**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 complainants.
  - 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. 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.

18. 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*.
19. 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's agreement (hereinafter referred as "FBA") with the respondent on 16.01.2012. 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 flat buyer's agreement.



20. 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 16.01.2012. 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 willful defaulters since the beginning, not paying their due instalments on time as per the payment plan opted at the time of execution of flat buyer's agreement.
21. The respondent submitted that the complainants made a number of defaults in timely payment of the instalments. Delay in ensuring the timely payment of the instalments 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.

22. 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 flat buyer's agreement.
23. 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.
24. 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.
25. 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'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.

26. 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.
27. 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 and 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.

28. 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.
29. It is pertinent to mention that the project of the respondent i.e., India bulls 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 06.02.2019, however it is the complainants who are not taking the possession of the same.
30. 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.

31. 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:**

32. 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 and second 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. Grace period of 6 months is given to the respondent due to exigencies beyond the control of the respondent. The agreement was executed on 16.01.2012. Therefore, the due date of possession shall be computed from 16.01.2012. 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 16.07.2015 and the possession of the subject unit was offered to the complainants on 06.02.2019. The possession has been delayed by approximately 3 years 06 months 21 days till date of offer of possession. As the promoter has failed to fulfil its obligation under section 11(4)(a) of the Act *ibid*. The complainants are 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. 16.07.2015 till the offer of possession i.e. 06.02.2019.

- ii. With respect to **third issue** raised by the complainants, the complainants have merely asserted the same and not

produced any documents supporting the same. Thus, this issue is decided in negative.

**FINDINGS OF THE AUTHORITY:**

33. 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.
34. 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.

35. Regarding the issue of arbitration clause in the agreement raised by the respondent is its reply, 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.
36. 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.
37. As per clause 21 of the flat buyer's agreement dated 16.01.2012 for unit no. G 091, 9<sup>th</sup> floor, tower G in project Indiabulls Enigma, Gurugram, possession was to be handed



over to the complainants within a period of 3 years + 6 months grace period from the date of execution of agreement i.e. 16.01.2012 which comes out to be 16.07.2015. However, the respondent has not delivered the unit in time. The respondent has offered the possession to the complainants on 06.02.2019. As such complainants are entitled for delayed possession charges at prescribed rate i.e. 10.45% per annum w.e.f. 16.07.2015 to 06.02.2019 as per proviso to section 18 of the Act ibid till offer of possession. Since the possession has already been offered to the complainant, the complainant is directed to take over the possession of the unit within a period of one month on payment of balance dues, if any, after adjusting the amount accrued on account of award of delayed possession charges.

**DECISION AND DIRECTIONS OF THE AUTHORITY:**

38. 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. Respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f. 16.07.2015 to 06.02.2019 as per provisions of proviso to section 18(1) of the Act ibid till offer of possession.

- b. The arrears of interest accrued shall be paid to the complainants within 90 days from the date of this order.
- c. The complainants are directed to take the possession of the unit within a period of one month on payment of balance dues, if any, after adjusting the amount accrued on account of award of delayed possession charges.
- d. The promoter shall not charge anything from the complainant which is not a part of the flat buyer's agreement.
39. The order is pronounced.
40. Case file be consigned to the registry.

  
(Samir Kumar)

Member

  
(Subhash Chander Kush)

Member

Date: 21.08.2019

Judgement uploaded on 19.09.2019