

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

Complaint no. : 2024 of 2019
First date of hearing : 04.09.2019
Date of decision : 04.09.2019

1. Ms. Parul Garg
2. Ms. Uma Garg

Both R/o: 902, Building-A, Gayatri Heritage,
Plot no. 37, Sector 20, Kharghar, Navi Mumbai-
410210

Complainants

Versus

M/s Athena Infrastructure Ltd.
Office address: M-62 & 63, First Floor,
Connaught Place, New Delhi-110001.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

**Chairman
Member
Member**

APPEARANCE:

Sh. Vijender Parmar

Advocate for the complainants

Sh. Amit Aggarwal along with

Advocates for the respondent

Ms. Kanika

ORDER

1. A complaint dated 21.05.2019 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 Ms. Parul Garg & Anr., against the promoter M/s Athena Infrastructure Ltd, on

DEEPANSHU SINGLA

Legal Assistant



account of violation of the clause 21 of the flat buyer's agreement dated 12.08.2011 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 12.08.2011 i.e. prior to the commencement of the Act *ibid*, 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 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 case are as under: -

1.	Name and location of the project	"Indiabulls Enigma", Pawala Khusrupur Village, Sector 110, Gurugram, Haryana
2.	Project area	15.6 acres
3.	Nature of the project	Group housing colony
4.	DTCP License	213 of 2007 dt. 05.09.2007 10 of 2011 dt. 29.01.2011

DEEPANSHU SINGLA

Legal Assistant



		64 of 2012 dt. 20.06.2012
5.	RERA Registered/ not registered.	Registered
6.	HRERA registration number	351 of 2017
7.	HRERA registration certificate valid upto	31.08.2018 (already expired)
8.	Flat/unit no.	C-092, tower C
9.	Flat measuring	3400 sq. ft.
10.	Date of execution of flat buyer's agreement-	12.08.2011
11.	Payment plan	Construction linked plan
12.	Sale price	Rs.1,92,44,998/- As per the applicant ledger dated 21.05.2019 on pg. 72 of the reply
13.	Total amount paid by the complainants	Rs.1,92,70,057/- As per the applicant ledger dated 21.05.2019 on pg. 73 of the reply
14.	Due date of delivery of possession as per clause 21 of flat buyer's agreement (3 years + 6 months grace period from the date of execution of agreement i.e. 12.08.2011)	12.02.2015
15.	Delay in handing over possession till date of decision	4 years 6 months 23 days
16.	Penalty As per clause 22 of the flat buyer's agreement	Rs.5/- per sq. ft. per month for the period of delay.

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 12.08.2011 is available on record for the aforesaid flat. As per clause 21 of the said agreement, the possession of the



subject flat was to be delivered by 12.02.2015. The respondent has failed to handover the possession of the subject unit by the due date, thus 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 04.09.2019. The reply filed on behalf of the respondent on 12.06.2019 has been perused by the authority. The respondent through its counsel appeared on 04.09.2019.

FACTS OF THE COMPLAINT

6. The complainants submitted that somewhere in the first half of year 2011, the respondent through its marketing executives and advertisement via various mediums & means approached them, with an offer to invest and buy a flat in the proposed real estate project of respondent, namely "**Indiabulls Enigma**" in the Sector-110, village Pawala-Khusrupur, Gurugram. The respondent represented to them that the respondent is a very ethical business house in the field of construction of residential and commercial project and in case they would



invest in the said project then it would deliver the possession of proposed flat on the promised delivery date as per the best quality assured by the respondent.

7. The complainants submitted that relying upon those assurances and believing them to be true, they booked a residential flat bearing no. C092 on 9th floor in tower - C in the proposed project of the respondent admeasuring approximately super area of 3400 sq. ft. (315.87 sq. mtr.) and covered area of 2605.54 sq. ft. (242.07 sq. mtr.) in the township to be developed by respondent. It was assured and represented to them 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, they paid Rs. 5,00,000/- through cheque dated 27.04.2010 as booking amount.

8. The complainants submitted that, thereafter, the respondent started raising the demand of money /installments from them, which were duly paid by them as per agreed timelines and along-with the making of payments, complainants time and



again 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 them on lame excuses and deliberately and intentionally delayed the execution of the flat buyer's agreement for more than 4 months and ultimately it was executed on 12.08.2011.

9. The complainants submitted that at the time of execution of the said agreement, the respondent misusing its dominant position had coerced and pressurized the complainants to sign the arbitrary, illegal and unilateral terms of the said flat buyer's agreement and when they objected to those arbitrary terms and conditions of the said agreement and refused to sign the same, the respondent threatened to forfeit the amount already paid by them as sale consideration in respect of the said flat and also to cancel their booking. They having no other option and to found themselves helpless and being cheated, under duress and coercion had signed the said flat buyer's agreement.

DEEPANSHU SINGLA

Legal Assistant



10. The complainants submitted that as per the clause 21 of the flat buyer's agreement dated 12.08.2011, the respondent has agreed and promised 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.
11. 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 complainants 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 complainants to buy the said flat on the basis of its false and frivolous promises and representations about the delivery timelines aforesaid housing project.

DEEPANSHU SINGLA

Legal Assistant

ISSUES TO BE DECIDED

12. The complainants have raised the following issues:



- i. Whether the document titled as “flat buyer’s agreement” is one sided and unilateral?
- ii. Whether the document titled as “flat buyer’s agreement” was signed by the complainants under duress and coercion?
- iii. Whether the complainants are entitled for the interest at the rate of 18% P.A. on the total sale consideration amounting to Rs. 1,92,70,057/- 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 of said flat?

RELIEFS SOUGHT

13. The complainants are seeking the following reliefs:
 - i. Direct the respondent to pay the interest at the rate of 18% P.A. on the total amount to Rs. 1,92,70,057/- paid by the complainants for the said flat on account of delay in delivering possession from the date of payment till delivery of physical and vacant possession of said flat?

DEEPANSHU SINGLA

Legal Assistant



- ii. Direct the respondent to pay an amount of Rs. 55,000/- to the complainants as cost of the present litigation.

RESPONDENT'S REPLY

14. The respondent submitted that complaints pertaining to compensation/interest are to be decided by the hon'ble adjudicating officer under section 71 of the Act, read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone and by itself. This is settled law in view of the judgement dated 02.05.2019 passed by the hon'ble Haryana Real Estate Appellate Tribunal in the matter of **Sameer Mahawar vs. MG Housing Pvt. Ltd., Appeal No. 06/2018**, and other connected matters.
15. The respondent submitted that the complaint is also liable to be dismissed for the reason that for the flat in question, the flat buyer's agreement was executed on 12.08.2011 i.e. prior to coming into effect of the Act and the Rules. As such, the terms and conditions of the agreement executed prior to the applicability of the Act and the Rules, would prevail and shall



be binding between the parties. In view thereof, the hon'ble authority has no jurisdiction to entertain the present complaint as the complainants have no cause of action to file the present complaint under the Act/Rules.

16. The respondent submitted that the basis of the present complaint is that there is a delay in delivery of possession of the flat in question, and therefore, interest has been claimed for the same. It is further submitted that the agreement itself envisages the scenario of delay and the compensation thereof. In terms of clause 21 thereof, the respondent was to endeavour to offer possession of the flat in question within 3 years with 6 months grace period. The said clause only prescribes an estimated time period for handing over of possession. The time period mentioned therein is neither cast in stone nor fixed. It is only a tentative estimate provided by the respondent. More importantly, the same was subject to not only force majeure, but primarily on "timely payment" of all installments by the complainants.

17. The respondent submitted that the complainants have defaulted in timely payment of almost all instalments. The



complainants have opted for a payment plan at the time of booking of the flat in question that was construction linked and had agreed and undertaken to pay the instalments as and when demanded by the respondent. The complainants were provided with the booking application form containing the terms and conditions of provisional allotment and the complainants were given the opportunity to familiarize themselves with the same. Clause 11 of the terms and conditions of booking was specifically brought to the complainants notice which provided that timely payment of amounts payable by the complainants shall be the essence of the contract. It was specifically emphasized by the respondent that interest @18% shall be levied on delayed payments and that in the event of delay in payment of outstanding amount along with interest, the allotment was liable to be cancelled and the respondent would be entitled to forfeit earnest money along with interest on delayed payment and other applicable charges. Further at time of execution of the agreement, it was also in the knowledge of the complainants that subject to timely payment of all amounts payable by the complainants

DEEPANSHU SINGLA

Legal Assistant



and subject to reasons beyond the control of the respondent, possession of the flat was proposed to be offered by the respondent, within 3 years with six months grace period. The terms and conditions as set out in the agreement were accepted by the complainants and the complainants agreed and undertook to scrupulously comply with the same. Therefore, they are now barred by estoppel in raising any grievance qua the same. It does not now lie in the mouths of the complainants to allege default on part of the respondent. The non-payment of instalments on time directly impacts the ability of the developer to complete construction work.

18. The respondent submitted that 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. That the State Government terribly failed to provide the basic amenities due to which the construction progress of the project was badly hit.



19. The respondent submitted that due to slow pace of construction, a tremendous pressure was put on the contractors engaged to carry out various activities in the project due to which there was a dispute with the contractors resulting into foreclosure and termination of their contracts and the respondent had to suffer huge losses which resulted in delayed timelines. Despite the best efforts, the ground realities hindered the progress of the project.
20. The respondent submitted that it has already completed 95% construction of the tower wherein the flat was booked by the complainants. It is further pertinent to mention that the respondent is in process of obtaining the occupation certificate for the same and shall handover the possession of units to its respective buyers post grant of occupation certificate from the concerned authority.
21. The respondent submitted that it has acted strictly in accordance with the terms and conditions of the agreement between the parties. There is no default or lapse on the part of the respondent. The allegations made in the complaint that the respondent has failed to complete construction of the flat and

deliver possession of the same within the stipulated time period, are manifestly false and baseless. On the contrary, it is the complainants who are in clear breach of the terms of the agreement by not paying the installments in time as per the payment plan, without any cause or justification.

DETERMINATION OF ISSUES

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

22. With respect to the **first issue** raised by the complainants the authority is of the view that, the delay compensation payable by the respondent as per clause 22 of the flat buyer's agreement @ Rs. 5/- per sq. ft. per month for the super area calculated for the entire period of delay 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. It has also been observed in para 181 of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)*, wherein the Bombay HC bench held that:

DEEPANSHU SINGLA

Legal Assistant



"...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."

23. With respect to the **second issue** raised by the complainants neither the same has been pressed at the time of argument nor has been proved by the complainants in any of the way orally or by documents, thus this issue is decided in negative.
24. With respect to the **third issue** raised by the complainants the authority is of the view that, as per clause 21 of the flat buyer's agreement dated 12.08.2011, the possession of the unit was to be handed over within 3 years plus grace period of 6 months from the date of execution of agreement. The flat buyer's agreement was executed on 12.08.2011. the relevant clause is reproduced under-

"the developer shall endeavour to complete he construction of the said building/unit within a period of 3 years, with a 6 months grace period thereon from the date of execution of the flat buyer's agreement..."

Accordingly, the due date comes out to be 12.02.2015. The respondent has violated the terms and conditions of the



agreement by not handing over the possession by the due date, thus the promoter has failed to fulfil its obligations under section 11(4)(a) of the Act *ibid*.

The authority is also of the view that, the complainants are liable to get the delayed possession charges from the respondent for the period of delay i.e. 4 years 6 months and 23 days under section 18(1) proviso of the Act *ibid* to be read with rule 15 of the Rules *ibid* at the prescribed rate of 10.45% p.a.

FINDINGS OF THE AUTHORITY

25. 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 complainants 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.

26. As per clause 21 of the flat buyer's agreement dated 12.08.2011 for unit no. C-092, tower-C, 9th floor in project "Indiabulls Enigma" Sector-110, Gurugram, possession was to be handed over to the complainants within a period of 3 years from the date of execution of the said agreement i.e. 12.08.2011 + 6 months grace period which comes out to be 12.02.2015. The respondent has miserably failed to deliver the possession of the unit in time. Complainants has already paid Rs. 1,92,70,057/- to the respondent against a total sale consideration of Rs. 1,92,44,998/-. A such, the complainants are liable for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f. 12.02.2015 as per the provisions of section 18(1) proviso of the Real Estate (Regulation and Development) Act, 2016 to be read with rule 15 of the Real Estate (Regulation and Development) Rules, 2017 till the actual delivery of possession.

DEEPANSHU SINGLA

Legal Assistant

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 complainants are liable for delayed possession charges at prescribed rate of interest i.e. 10.455 per annum w.e.f. 12.02.2015 as per the provisions of section 18(1) proviso of the Real Estate (Regulation and Development) Act, 2016 to be read with rule 15 of the Real Estate (Regulation and Development) Rules, 2017 till the actual delivery of possession.
- (ii) The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of each subsequent month.
- (iii) Interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e.

DEEPANSHU SINGLA

Legal Assistant


10.45% by the promoter which is same as is being granted to the complainants in case of delayed possession.

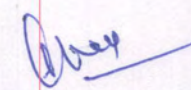
- (iv) Complainants are directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period of possession.
- (v) The promoter shall not charge anything from the complainants which is not a part of the flat buyer's agreement.

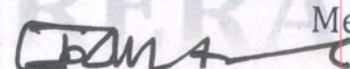
28. Complaint stands disposed off.

29. The order is pronounced.

30. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Date: 04.09.2019

Judgement uploaded on 19.11.2019

DEEPANSHU SINGLA
Legal Assistant