

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

Complaint No. : 2017 of 2019
Date of First Hearing: 04.09.2019
Date of Decision : 04.09.2019

1. Mr. Ashok Garg
2. Ms. Parul Garg
Both R/o:- Flat no. 902, building A, Gayatri
Heritage, Plot No. 37, Sector-20, Kharghar,
Navi Mumbai-410210.

Complainants

Versus

Athena Infrastructure Limited
Regd. Office:- 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:

Shri Vijender Parmar Advocate for the complainants
Shri Amit Agarwal and Ms. Kanika Advocates for the respondent

HARERA
ORDER
GURUGRAM

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 Mr. Ashok Garg and Mrs. Parul Garg, against the promoter Athena Infrastructure Limited in respect of plot/unit described below

in the project 'Indiabulls Enigma', for not handing over possession by due date which is in violation of the obligation of the promoter under section 11(4)(a) of the Act.

2. Since, the flat buyer agreement has been executed on 12.08.2011 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.	C-102, 10 th Floor, Tower C
5.	Area of the said unit	3350 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 II-354 of 2017 dated 17.11.2017
9.	RERA registration certificate valid upto	Phase II-30.09.2018 Note: this has already expired



10.	Date of execution of flat buyer agreement	12.08.2011 (Pg. 26 of the complaint)
11.	Total sales consideration	Rs. 1,99,23,635/- (including taxes) Note - As per the applicant ledger dated 21.05.2019 on Pg. 52-53 of the complaint
12.	Total amount paid by the complainants	Rs. 1,90,61,688/- (Pg. 52-53 of the complaint)
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	12.02.2015 Note:- the flat buyer agreement is executed on 12.08.2011
15.	Delay in handing over the possession till date	4 years 6 months 23 days
16.	Penalty as per clause 22 of the builder buyer's agreement dated 12.08.2011	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 12.08.2011 is available on record for the aforementioned flat according to which the possession of the same was to be delivered by 12.02.2015. However, the respondent has failed to deliver the possession till date which is in violation of section 11(4)(a) of the Act.

5. Taking cognizance of the complaint, the authority issued notice on 22.05.2019 to the respondent for filing reply and for appearance. The case came up for hearing on 04.09.2019. The reply on behalf of the respondent was filed on 12.06.2019 which has been perused by the authority. The respondent through its counsel appeared on 04.09.2019.

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 first half of year 2011, 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 project namely "Indiabulls Enigma" in the Sector-110, Gurugram.
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

13. 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 02.03.2019, issued by the respondent upon the request of the complainants, the complainants have already paid Rs. 1,90,61,688/- towards total sale consideration as on today to the respondent and now nothing major is pending to be paid on the part of complainants. The total sale consideration for the said flat as mentioned in the ledger statement as issued by the respondent is Rs. 1,89,73,735/-.

14. The complainants submitted that on the date agreed for the delivery of the possession i.e. 11.02.2015 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.

Issues raised by the complainants: -

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

- I. Whether the complainants are entitled for the interest at the rate of 18% p.a. on the total sale consideration amounting to Rs.1,90,61,688/- 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?

- II. Whether the document titled as “flat buyer agreement” is one sided and unilateral?

Relief sought:-

- Direct the respondent to pay interest at the rate of 18% p.a. on account of delay in offering possession on Rs. 1,90,61,688/- paid by the complainants as sale consideration of the said flat from the date of payment till date of delivery of possession.

Reply by the respondent: -

16. The respondent submitted that the complaint is liable to be dismissed for the reason that for the flat in question, the flat buyer agreement was executed on 12.8.2011 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.

17. The present complaint is otherwise also not maintainable either in law or facts. It is submitted that the present complaint has been filed by the complainant seeking interest/compensation

qua the flat booked by the complainants. The present complaint is liable to be dismissed on the ground that a complaint for compensation/interest under section 14, 14, 18 and 19 of the Act is maintainable only before the hon'ble adjudicating officer and not before this hon'ble authority.

18. 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.

19. The respondent submitted that if this authority has to determine delay on the basis of the estimated time period provided in the said agreement, it has to do so on the strict

interpretation of the said clause. The said clause categorically reads that the time period mentioned for handing over of possession is also dependent on the complainants making timely payment of all installments.

20. The respondent submitted that the complainants have defaulted in timely payment of almost all instalments. The complainants had 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 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. Default on part of the allottees who fail to make timely payment of instalments leads to delay in delivery of possession. Therefore, the developer cannot be faulted for such delay which is directly attributable to the defaults committed by the allottees like complainants.

21. The respondent submitted that 95% construction of the tower wherein the flat was booked by the complainants is completed and 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.

22. It is submitted that the flatt in question is in the name of joint allottees, i.e. Mr. Ashok Garg (complainant no.1) and Ms. Parul Garg (complainant no.2). Ms. Parul Garg does not reside in the country and is, in fact, a resident of United Kingdom. Therefore, for the present complaint to be filed validly, it has to be filed on behalf of both complainants with proper affidavits and authorizations.

23. The respondent submitted that the present complaint is barred on account of existence of an arbitration clause being clause 49 in the agreement dated 12.8.2011. Hence, this hon'ble authority does not have the jurisdiction to hear and decide the present complaint.

24. The respondent submitted that the complainants have no locus standi or cause of action to file the present complaint. The bare perusal of the complaint will make it evident that the complainants have miserably failed to make a case against the respondent of contravention of any provision of the Act or any of the Rules made thereunder. It is 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.

Determination of issues:-

25. 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 third issue** raised by the complainants, the authority came across that as per the clause 21 of the flat buyer agreement, the possession of the said flat was to be delivered 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. The agreement was executed on 12.08.2011, hence the due date for delivery of possession comes out to be 12.02.2015. Although, the actual offer of possession of the said unit has not been made by the respondent till now. The possession has been delayed by a period of 4 years 6 months and 23 days till date. As the promoter has failed to fulfil its obligation under section 11(4)(a) of the Act, the complainants are entitled for interest on the delayed possession charges at the prescribed rate of interest i.e. 10.45% as per section 18(1) proviso of the Act ibid to be

read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.

- 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 12.08.2011, the due date of possession was 12.02.2015 and the possession has not been offered till date, which has been delayed by 4 years 6 months and 23 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.
- III. 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: -

26. 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.

27. The issue regarding the arbitration clause as raised by the respondent in their 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.

28. 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.

29. Project is registered with the authority.

30. Arguments heard. Since the respondent has failed to deliver the possession of the unit in question as per clause 21 of the agreement to sell dated 12.08.2011, hence the complainants are entitled for delayed possession charges at the prescribed rate of interest i.e. 10.45% p.a. for every month of delay, on the paid amount of the complainants in terms of section 18(1) proviso of

the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.

Decision and directions of the authority:-

31. 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 to the parties:-

- i. The respondent is directed to pay delayed possession charges at the prevalent prescribed rate of interest of 10.45% p.a. with effect from 12.02.2015 till the actual delivery of possession.
- ii. The arrears of interest so accrued @ 10.45% p.a. from due date of delivery of possession (12.02.2015) till the date of order be paid to the complainants within 90 days from the date of this order. Thereafter, monthly interest at prescribed rate be paid on or before 10th of each subsequent month.
- iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed

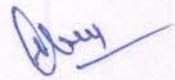
period of possession. Interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.45% p.a. by the respondent- promoter, which is the same as is being granted to the complainants in the form of delayed possession charges.


iv. The respondent-promoter shall not charge anything from the complainant which is not the part of the agreement to sell.

32. The order is pronounced.

33. 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

Dated: 04.09.2019

Judgement Uploded on 19.11.2019