

PROCEEDINGS OF THE DAY

Day and Date	Friday and 14.12.2018
Complaint No.	681/2018 Case titled as Mr. Surendra Kumar Lohan V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Surendra Kumar Lohan
Represented through	Shri Anand Dabas Advocate for the complainant.
Respondent	M/S Athena Infrastructure Ltd.
Respondent Represented through	Shri Rahul Yadav Advocate for the respondent.
Last date of hearing	4.10.2018
Proceeding Recorded by	Naresh Kumari & H.R.Mehta

Proceedings

Arguments heard.

Project was registered with the authority.

Project is complete and the respondent has applied for occupation certificate.

As per clause 21 of the Builder Buyer Agreement dated 1.4.2013 for unit No.B044, 4th floor, Tower-B in project "Indiabulls Enigma, in Sector-110, Gurugram possession was to be handed over to the complainant within a period of 3 years + 6 months grace period which comes out to be **1.10.2016**. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,92,77,123/- to the respondent.

Complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **1.10.2016** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the handing over the offer of possession failing which the complainant is entitled to refund the amount.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

Complaint is disposed of accordingly. Detailed order will follow.
File be consigned to the registry.

Samir Kumar
(Member)
14.12.2018

Subhash Chander Kush
(Member)
14.12.2018

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

Complaint no. : 681 of 2018
First date of hearing : 14.12.2018
Date of decision : 14.12.2018

Mr. Surender Kumar Lohan
R/o R block, pent house, 18th floor
JMD Gardens, Sohna road,
Gurugram-122001.

..Complainant

Versus

M/s. Athena Infrastructure Ltd
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 Anand Dabas
Shri Rahul Yadav

Advocate for the complainant
Advocate for the respondent



ORDER

1. A complaint dated 06.08.2018 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.

Surender Kumar Lohan against the promoter, M/s. Athena Infrastructure Ltd. respect of apartment/unit described below in the project 'India Bulls Enigma', on account of violation of the section 11(4)(a) of the Act ibid

2. Since, the buyer's agreement has been executed on 01.14.2013 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non compliance of contractual 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: -

- **Nature of the project- Residential**
- **DTCP license no: 213 of 2007 dated 05.09.2007, 10 of 2011 dated 29.01.2011 and 64 of 2012 dated 20.06.2012**



1.	Name and location of the project	India bulls Enigma Sector 110, Gurugram
2.	Registered/Unregistered	Registered

3.	RERA registration valid up to	30.08.2018
4.	Payment plan	Construction linked
5.	Date of agreement	01.04.2013
6.	Unit no.	B 044, 4 th floor, tower B
7.	Area of unit	3350 sq. ft.
8.	Total consideration	Rs 1,94,76,250/-
9.	Total amount paid by the complainant	Rs 1,92,77,123/-
10.	Possession Clause 21 – 3 years plus 6 months grace period from the execution of flat buyer agreement	01.10.2016
11.	Penalty as per clause 22	Rs. 5 per sq. ft. per month of the super area
12.	Delay till date	Approximately 2 years 2 month 4 days

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly the parties appeared on 14.12.2018. The reply has been filed on behalf of the respondent which has been perused.



FACTS OF THE CASE:

5. That the respondent had advertised itself as a very ethical business group that lives onto its commitments in

delivering its housing projects as per promised quality standards and agreed timelines. That the respondent while launching and advertising any new housing project always commits and promises to the targeted consumer that their dream home will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling unit to them. They also assured to the consumers like complainant that they have secured all the necessary sanctions and approvals from the appropriate authorities for the construction and completion of the real estate project sold by them to the consumers in general.

6. That somewhere in the end of 2011, the respondent through its marketing executives and advertisement through various medium and means approached the complainants, who are the real brothers with an offer to invest and buy a flat in the proposed project of respondent, which the respondent was going to launch the project namely “**India bulls Enigma**” in the Sector-110, Village Pawala-Khusrupur, Gurugram. The respondent represented to the complainant that the respondent is a



very ethical business house in the field of construction of residential and commercial project and in case the complainants would invest in the project of respondent then they would deliver the possession of proposed flat on the assured delivery date as per the best quality assured by the respondent. The respondent had further assured to the complainants that the respondent has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to the complainants given by the respondent 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 made by the complainants. The complainants while relying on the representations and warranties of the respondent and believing them to be true had agreed to the proposal of



respondent to book the residential flat in the project of respondent.

7. That respondent arranged the visit of its representatives to the complainant and they also assured the same as assured by respondent to the complainants, wherein it was categorically promised by the respondent that they already have secured all the sanctions and permissions from the concerned authorities and departments for the sale of said project and would allot the residential flat in the name of complainants immediately upon the booking. Relying upon those assurances and believing them to be true, complainants booked a residential flat bearing no. B 044 on 4th floor in tower - B in the proposed project of the respondent measuring approximately super area of 3350 sq. ft. in the township to be developed by respondent. Accordingly the complainants have paid Rs.5,00,000 through cheque bearing No. 296817 dated 21.11.2011 as booking amount and respondent issued a receipt of dated 07.12.2011 for the same.



8. That the respondent assured the complainants that it would issue the allotment letter at earliest and maximum within one week, the complainant will get the builder buyer agreement as a confirmation of the allotment of said residential flat in their name. However, the respondent did not fulfill its promise and assurance and has issued only the application form on 23.11.2011, despite repeated requests and reminders of the complainants to issue the allotment letter and flat buyer's agreement.
9. That in the said application form, the price of the said flat was agreed at the rate of Rs.5,100/- per sq. ft. and Rs.200/- per sq. ft. as preferential location charges along-with the other charges as mentioned in the said application form. At the time of execution of the said application form, it was agreed and promised by the respondent that there shall be no change, amendment or variation in the area or sale price of the said flat from the area agreed or the price committed by the respondent in the said application form or agreed otherwise.



10. That thereafter, the respondent started raising the demand of money /installments from the complainant, which was duly paid by the complainants. That alongwith the making of payments, complainants time and again requested the respondent to execute the flat buyer's agreement as per its promise but the respondent acted arbitrarily and negligently. They have refused and ignored the requests and demands of the complainant and intentionally delayed the execution of the flat buyer's agreement for more than one year and ultimately it was executed on 01.04.2013.

11. That at the time of execution of the said agreement, the respondent misusing its dominant position had coerced and pressurized the complainant to sign the arbitrary, illegal and unilateral terms of the said flat buyer agreement and when the complainants had 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 the complainants as sale consideration in respect of the said flat and also to cancel their booking. The complainants having no other option



and to found themselves helpless and being cheated had under duress and coercion had signed the said flat buyer's agreement. The respondent while taking undue advantage of its dominant position had illegally changed and increased the per sq. ft. sale price of the said flat from Rs.5, 100/- per sq. ft. to Rs.5,229.10/- 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.

12. That as per the clause 21 of the said flat buyer's agreement dated 01.04.2013, the respondent had 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.

13. That from the date of booking and till today, the respondent had raised various demands for the payment of installments on complainants towards the sale consideration of said flat and the complainants have duly paid and satisfied all those demands as per the flat buyers



agreement without any default or delay on their part and have also fulfilled otherwise also their part of obligations as agreed in the flat buyers agreement. The complainants were and have always been ready and willing to fulfill their part of agreement, if any pending.

14. That the complainants jointly and severally have paid the entire sale consideration to the respondent for the said flat. As per the statement dated 30.07.2018, issued by the respondent, upon the request of the complainants, the complainants have already paid Rs.1,92,77,123/- towards total sale consideration as on today to the respondent as demanded time to time and now nothing major is pending to be paid on the part of complainants.

15. That the respondent has issued receipts from the date of booking in the name of both the complainants towards the payments made by the complainants to the respondent towards sale consideration for the said flat.

16. That the complainant Mr Surender Kumar Lohan had to the CEO and customer care of respondent company regarding



the arbitrary and illegal increment of the basic sale price in per square feet and objected the same vehemently. However, the respondent did not pay any heed to the request of the complainants and refused to revise the price in any manner or under any circumstances, whatsoever as agreed by it in the provisional application form. The complainants had also delivered a letter by hand in this regard to the respondent mentioning their grievances.

17. That on the date agreed for the delivery of possession of said unit as per date of booking and later on according to the flat buyers agreement, the complainants had approached the respondent and its officers inquiring the status of delivery of possession but none had bothered to provide any satisfactory answer to the complainants about the completion and delivery said flat.

18. That the complainants thereafter had tried their best to reach the representatives of the respondent to seek a satisfactory reply in respect of the said flat but all in vain. The complainants had also informed the respondent about their financial hardship of paying monthly rent of



Rs.40,000/- due to delay in getting possession of the said flat. The complainants had requested the respondent to deliver their flat home citing the extreme financial and mental pressure they were going through, but the respondent never cared to listen to their grievances and left them with them suffering and pain on account of default and negligence.

19. That the respondent has not completed the construction of said real estate project till now and the complainants have not provided with the possession of said unit despite all promises done and representation made by the respondent. By committing delay in delivering of the possession of the aforesaid flat respondent has violated the terms and conditions of the flat buyers agreement and promises made at the time of booking of said flat. The respondent has also failed to fulfill the promises and representation made it while selling the said flat to the complainants.

20. That the conduct on part of respondent regarding delay in delivery of possession of the said flat has clearly



manifested that respondent never ever had any intention to deliver the said flat on time as agreed.

21. That the respondent has committed grave deficiency in services by delaying the delivery of possession and false promises made at the time of sale of the said flat which amounts to unfair trade practice which is immoral as well as illegal. The respondent has also criminally misappropriated the money paid by the 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 basis its false and frivolous promises and representations about the delivery timelines aforesaid housing project.

22. That relying upon respondent's representation and believing them to be true, the complainants were induced to pay Rs.1,92,77,123/- as sale consideration of the aforesaid flat as on today.



23. That due to the failure on part of respondent to deliver the said flat on time as agreed in the builder buyer agreement, the complainants were constrained to stay in the rented accommodation by paying monthly rent along-with the monthly installments of home loan taken by them for the aforesaid flat. The complainants have therefore paid Rs.10,40,000/- as rentals @Rs.40,000/- per month for the rented accommodation for the period of delay i.e. 26 months from May 2015 to July 2018.

24. That the complainants have undergone severe mental harassment due to the negligence on the part of respondent to deliver their home on time agreed as they were compelled to pay Rs.40,000/- as monthly rental for the rented accommodation used by them.

ISSUES RAISED BY THE COMPLAINANTS:

25. The following issues have been raised by the complainant:
- Whether or not the complainants are entitled for the refund of sale consideration amounting to Rs 1,92,77,123?



b. Whether or not the complainants are entitled to compensation?

RELIEF SOUGHT BY THE COMPLAINANTS:

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

- i. Pass an order to direct the respondent to return/refund an amount of Rs.1,92,77,123 /- along with future and pendente-lite compounding interest @ 18% per annum from the date of payment till its final payment.
- ii. Pass an order to direct the respondent to pay an amount of Rs. 55,000/- to the complainants as cost of the present litigation.
- iii. Cost of the present complaint may also be awarded in favour of the complainants and against the respondent.
- iv. Any other relief/order or direction which this hon'ble authority may deems fit and proper



considering the facts and circumstances of the present complaint.

REPLY BY THE RESPONDENT:

27. The respondent submitted the fact that the instant complaint is not maintainable, on facts of law, and is as such liable to be dismissed at the threshold being in wrong provisions of the law. The present complaint is devoid of any merits and had been preferred with sole motive to harass the respondent. In fact, the present complaint is liable to be dismissed on the ground that the complainant has chosen to file the instant complaint for adjudication of its grievances before the adjudicating officer under section 31 of the RERA, 2016. Thus, this hon'ble authority does have any jurisdiction to entertain the same and the complaint is liable to be dismissed

28. That the allegations made in the instant complaint are wrong, incorrect and baseless in the fact of 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.

29. The complainants are falsifying their claim from the very fact that there has been alleged delay in delivery of possession of the booked unit however, that the complainants have filed the instant claim on the alleged delay in delivery of possession of the provisional booked unit. However, the complainants with nullified intention have not disclosed, in fact concealed the material facts from this hon'ble authority. The complainants have been willful defaulters from the beginning and not paying the installments as per the payment plan.

30. The respondent submitted that they have already completed the construction of tower A and also obtained OC for the concerned tower and already initiated the process of handing over of possession of tower A to the respective buyers. It is also submitted that they are under



the process of handing over of possession of the unit of the said tower including the unit of the complainant in question.

31. The respondent submitted that as per the flat buyers agreement dated 01.04.2013 was executed prior to coming into force of the Real Estate (Regulation and Development) Act, 2016. Further, the adjudication of the instant complaint for the purpose of granting interest and compensation as provided under the Act has to be in reference to the agreement for sale executed in terms of the said Act and Rules and no other agreement, whereas, the FBA being referred to or looked into in this proceeding is an agreement executed much before the commencement of the Act.

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



DETERMINATION OF ISSUES:

33. After considering the facts submitted by the complainants, reply by the respondents and perusal of record on file, the issue wise findings are as hereunder:

- i. With respect to the **first issue**, the authority came across that as per clause 22 of buyer's agreement, the possession of the said apartment was to be handed over within 3 years plus grace period of 6 months from the date of execution of flat buyers agreement. The agreement was executed on 01.04.2013. Therefore, the due date of possession shall be computed from the said date. 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/unit within a period of 3 years, with a six months grace period thereon from the date of execution of the flat buyers agreement subject to timely payment by the buyers of the total sale price payable according to the payment plan applicable to him or as demanded by the developer”



Accordingly, the due date of possession was 01.10.2016 and the possession has been delayed by 2 years 2 months and 4 days till the date. Delay charges will accrue from the due date of possession i.e. 01.10.2016 till the offer of possession.

The delay compensation payable by the respondent @ Rs 5/- per sq. ft. per month for the 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 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.”

The respondent has submitted in para 8 of his reply that the construction of tower B is complete and will apply for grant of occupational certificate shortly. He may kindly be directed to produce a copy of the same. Thus, refund may not be allowed at this stage as granting the same will hamper the remaining work of the project and will also affect the interest of other allottees who wish to continue with the project. The authority is of the view that interest shall be granted at prescribed rate as per the proviso of section 18, RERA and rule 15 of HARERA rules.

- ii. With respect to the **second issue**, the complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer.



FINDINGS OF THE AUTHORITY:

34. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

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

36. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.

37. Project is complete and the respondent has applied for occupation certificate. As per clause 21 of the builder buyer agreement dated 01.04.2013 for unit no B044, 4th floor, tower B in project "Indiabulls Enigma" in Sector 110, Gurugram, possession was to be handed over to the complainant within a period of 3 years + 6 months grace



period which comes out to be 01.10.2016. However the respondent has not delivered the unit in time. Complainant has already paid an amount of Rs 1,92,77,123/- to the respondent

DECISION AND DIRECTIONS OF THE AUTHORITY:

38. Thus, the authority exercising power under section 37 of Real Estate (Regulation & Development) Act, 2016 hereby issues directions:

- i. The respondent is directed to give the complainant delayed possession charges @ 10.75% per annum w.e.f 01.10.2016 till the date of offer of possession.
- ii. The cumulative interest so accrued from due date of delivery of possession i.e. till the date of order amounting to Rs. 45,12,674 be payable by the respondent failing which the complainant is entitled to refund the amount per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 within 90 days from the date of this order.



iii. Thereafter the monthly payment of interest amounting to Rs. 1,72,690/- on 10th of every month of delay till the handing over of possession

39. The order is pronounced.

40. Case file be consigned to the registry.

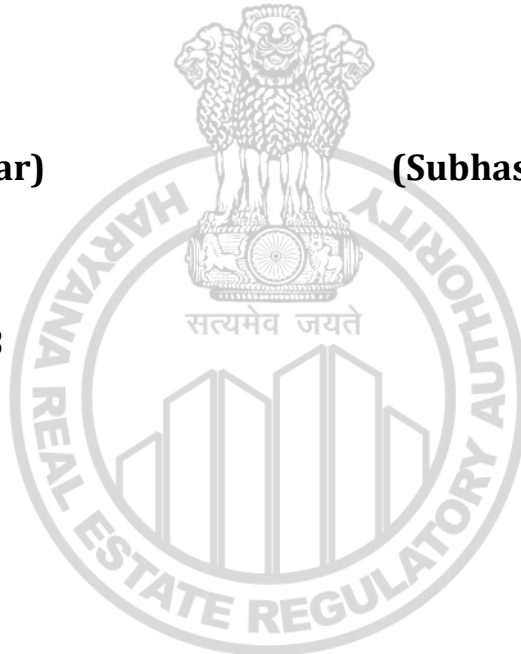
(Samir Kumar)

Member

Date:14.12.2018

(Subhash Chander Kush)

Member



HARERA
GURUGRAM



Judgement Uploaded on 05.01.2019