

**PROCEEDINGS OF THE DAY**

Day and Date	Friday and 07.12.2018
Complaint No.	553/2018 Case Titled As Ms. Shashi Nagapal & Anr V/S M/S Athena Infrastructure Ltd.
Complainant	Ms. Shashi Nagapal & Anr
Represented through	Shri Vaibhav Suri Advocate for the complainant.
Respondent	M/S Athena Infrastructure Ltd.
Respondent Represented through	Shri Rahul Yadav Advocate for the respondent.
Last date of hearing	18.9.2018
Proceeding Recorded by	Naresh Kumari

**Proceedings**

Arguments heard.

As per clause 21 of the Builder Buyer Agreement dated 26.6.2011 for unit No.B-042, Tower B, 4<sup>th</sup> floor in project "Indiabulls Enigma, 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 **26.12.2014**. However, the respondent has not delivered the unit so far. Complainant has already paid Rs.1,70,83,492/- to the respondent.

Project was registered but the date of completion of project has elapsed on 31.8.2018 as per registration certificate. Counsel for the

respondent stated that they have applied for extension of registration and the revised date of delivery of possession is March 2019. Project is badly delayed.

Complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **26.12.2014** 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 seek refund the amount alongwith interest.

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 10<sup>th</sup> of subsequent month.

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

Samir Kumar  
(Member)  
7.12.2018

Subhash Chander Kush  
(Member)  
7.12.2018

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

**Complaint no. : 553 of 2018**  
**First date of hearing : 10.9.2018**  
**Date of decision : 7.12.2018**

Ms. Shashi Nagpal and Mr. Uday Nagpal  
R/o: B1/901, Delhi State Newspaper  
Employees Federation (NPEF) Society,  
Plot No-1, Sector 19, Dwarka,  
New Delhi-110075

**Complainant**

Versus

M/s Athena Infrastructures Ltd.  
Address: M-62 and 63, first floor,  
Connaught place, New Delhi-110001

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Vaibhav Suri  
Shri Rahul Yadav

Advocate for the complainants  
Advocate for the respondent

**ORDER**

1. A complaint dated 10.7.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Ms. Shashi Nagpal and Mr. Uday Nagpal against M/s. Athena



Infrastructures Ltd. in respect of apartment/unit described below in the project 'Indiabulls 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 26.6.2011 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 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 case are as under: -

**\*Property type:** Group housing colony

**\*DTCP licence no.:** 213 of 2007 dated 5.9.2007, 10 of 2011 dated 29.1.2011 and 64 of 2012 dated 20.6.2012

**\*Licence holder:** M/s. Athena Infrastructures Ltd.

1.	Name and location of the project	"INDIABULLS ENIGMA", Pawala Khusrupur Village, Sector-110, Gurugram, Haryana.
2.	RERA registered/ not registered	<b>Registered</b>
3.	RERA registration number	<b>351 of 2017</b>
4.	Revised date of possession as per RERA registration certificate	31.8.2018
5.	Unit no.	B-042, 4 <sup>th</sup> floor, tower-B
6.	Unit measuring	3350 sq. ft.



7.	Buyer's agreement executed on	26.6.2011
8.	Basic sale price as per statement of buyer's agreement	Rs./-1,63,45,000
9.	Total amount paid by the complainants till date	Rs.1,70,83,492/-
10.	Percentage of consideration amount	90%
11.	Payment plan	Construction link payment plan
12.	Due date of delivery of possession (36 months from the date of execution of the agreement + 6 months grace period) clause 21	26.12.2014
13.	Delay in handing over possession till date	3 years 11 months 10 days (approx.)
14.	Penalty clause as per buyer's agreement dated 10.08.2012	Clause 22 of the agreement i.e. Rs.5 per sq. ft' of the super area.

4. The 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 buyer's agreement is available on record for the aforesaid unit. The possession of the said unit was to be delivered by 10.02.2016 as per the said agreement. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent filed the reply on 16.08.2018



### BRIEF FACTS OF THE COMPLAINT

6. That the complainants booked a flat in the project “Indiabulls Enigma” and the buyer’s agreement was executed on 26.6.2011. That the complainants were allotted flat no. B-042 on 4<sup>th</sup> floor in tower-B admeasuring 3350 sq. ft’.
7. That the complainants paid a total sum of Rs.1,70,83,492/- but the promoter failed to offer possession of the flat till date. During construction the respondent changed the original plan and increased 4 floors in towers A to D which will disturb the density of the colony and its basic design structure. This will lead to strain on common facilities like open areas, car parking space, club facilities and swimming pool usage. Moreover, the strength of the tower will also be compromised.
8. The consent of complainant was not taken to increase the floors and is violation of representations made in the advertisement. The complainants have made several visits to the project site and have observed serious quality issues with respect to construction. The respondent has illegally charged car parking charges, EDC and IDC and has misrepresented regarding claiming of VAT.



9. That the respondent collected Rs.10,55,250/- from complainants towards EDC/IDC which is in excess of Rs.315 per sq. mt. as against Rs.190 sq. mt. The complainant demanded for refund from respondent and the respondent provided refund of Rs3,01,500/- on 15.8.2018. Moreover, no interest was paid on this amount and the respondent inflated measurable super area and also wrongfully charged service tax.

**10. ISSUES RAISED BY THE COMPLAINANT**

- i. Whether the respondent has unjustifiably delayed the construction and development of the project in question?
- ii. Whether the respondent has over charged EDC and IDC?
- iii. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
- iv. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?



## 11. RELIEF SOUGHT

The complainants are seeking the following reliefs:

- i. To direct the respondent to provide delay interest @18% p.a. for every month for every month of delay till the handing over of possession.
- ii. To direct the respondent to provide the schedule of construction and also to rectify the breaches with regard to extra EDC/IDC charges, parking charges, VAT, service tax, PLC as well as wrongfully inflating the super area.
- iii. To direct the respondent to pay Rs.50,000 as the cost for litigation.
- iv. To pass any other order as this hon'ble authority may deem fit and proper.

## RESPONDENT'S REPLY

12. That the complaint filed by the complainant is outside the purview of this authority as the complainant is not a consumer and since he himself approached the respondent to book the flat after making due diligence and enquiries before executing the buyers agreement. As per clause 49 of the buyer's agreement it was agreed between both the parties that any dispute arising for the said unit will be adjudicated through the arbitration mechanism. Thus, the complainant is





contractually and statutorily barred from invoking the jurisdiction of this authority in the event of a civil dispute.

13. That the complaint under sections 12, 18 and 19 are required to be filed before the adjudicating officer under rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017.
14. That the relationship between the parties is governed by buyer's agreement dated 26.6.2011. The complainant has not disclosed the fact that he is a wilful defaulter. The complainant has not come before this authority with clean hands and wish to take advantage of their own misdoings.
15. Clause 22 of the buyer's agreement provides a mechanism to cover exigencies of inordinate delay which is reproduced hereunder:

*"In the event of developer failing to offer the possession of the unit to the buyers within the time as stipulated herein, except for the delay attributable to the buyer/force majeure, the developer shall pay to the buyer penalty of Rs. 5 per sq. ft' of super area per month for delay."*

16. That the respondent has continued with the construction of tower-C which is in completion stage and the respondent will apply for occupation certificate very soon. The delay in completion was beyond the control of the respondent since a number of permissions are required which were delayed



including a ban by NGT on construction activities. Delay by such contingencies has been mentioned in clause 39.

17. The buyer's agreement that has been referred to herein was executed much before the coming into force of RERA and RERA rules. Thus, no relief can be granted to the complainants on the basis of the new agreement to sell as per RERA.

18. Around 50% of the buyers have defaulted in payments and there has been many difficulties in getting approvals and then also the respondent did not stop the construction work and has now reached its pinnacle.

#### **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:

19. With respect to the **first issue**, the respondent is liable to pay interest on the delayed possession. This is fortified from the fact that as per clause 21 of the agreement dated 26.6.2011, the construction was to be completed within a period of 3 years with a grace period of six months. The due date of possession comes out to be 26.12.2014 which has already lapsed. Thus, the complainant is 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. 26.12.2014 till the offer of possession.

20. With respect to the **second issue**, as per clause 6(vii) of the buyer's agreement, the respondent can change revised EDC/IDC charges with retrospective effect as imposed by the central or state government or any other authority. So, EDC/IDC are charged as per the term of the agreement.

21. With respect to the **third and fourth issue**, these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainant has only dealt these issues in the facts of the complaint and no documents have been annexed in respect of the same, thus issues are answered in negative.

22. The promoter is liable under section 18(1)(a) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. The prayer of the complainant regarding payment of interest at the prescribed rate for every month of delay, till handing over of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per provisions of section 18(1)(a) is hereby allowed.



The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. 26.12.2014 till this day.

### FINDINGS OF THE AUTHORITY

23. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. 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.

24. For the issue of arbitration clause raised by the respondent, the amendment of section 8 of the Arbitration and conciliation act does not have the effect of nullifying the ratio of 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.

25. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession.

#### **DECISIONS AND DIRECTIONS OF THE AUTHORITY**

26. After taking into consideration all the material facts as adduced and produced 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 respondent in the interest of justice and fair play:

- (i) As per clause 21 of the builder buyer agreement dated 26.6.2011 for unit no.B-042, tower B, 4<sup>th</sup> floor in project “Indiabulls Enigma”, 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 **26.12.2014**. However, the respondent has not delivered the unit



so far. Complainant has already paid Rs.1,70,83,492/- to the respondent.

- (ii) Project was registered but the date of completion of project has elapsed on 31.8.2018 as per registration certificate. Counsel for the respondent stated that they have applied for extension of registration and the revised date of delivery of possession is March 2019. Project is badly delayed.
- (iii) Complainant is entitled for delayed possession charges of **Rs.72,48,207.50** at prescribed rate of interest i.e. 10.75% per annum w.e.f **26.12.2014** 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 seek refund the amount along with interest.
- (iv) The arrears of **Rs.72,48,207.50** accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of **Rs.1,53,039.62** interest till handing over the possession shall be paid before 10<sup>th</sup> of subsequent month.



27. The order is pronounced.

28. Case file be consigned to the registry.

**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 7.12.2018



HARERA  
GURUGRAM



Judgement uploaded On 05.01.2019