

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 13.12.2018
Complaint No.	606/2018 Case titled as Mr. Sant Kumar V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Sant Kumar
Represented through	Shri Vijender Parmar, Advocate for the complainant.
Respondent	M/S Athena Infrastructure Ltd.
Respondent Represented through	Shri Rahul Yadav Advocate for the respondent.
Last date of hearing	25.9.2018
Proceeding Recorded by	Naresh Kumari

Proceedings

Project is registered with the authority.

Arguments heard.

At the time of arguments, the respondent apprised that they had already received occupation certificate on 6.4.2018 and he had sent possession letter to the buyer on 3.7.2018, whereas the counsel for the complainant has stated that complainant has received a copy of offer of possession on 27.11.2018 (copy of the said letter has been placed on record).

As per clause 21 of the Flat Buyer Agreement dated 5.11.2012, for unit No.A 084, 8th floor, Block-A in Indiabulls Enigma, Sector-110, Gurugram possession was to be handed over to the complainant within a period of 36 months + 6 months grace period which comes out to be 5.5.2016. However,

the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,94,12,748/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f 5.5.2016 till the date of offer of possession i.e. 3.7.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

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

Samir Kumar
(Member)
13.12.2018

Subhash Chander Kush
(Member)
13.12.2018

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

Complaint No. : 606 of 2018
First date of hearing: 25.09.2018
Date of Decision : 13.12.2018

Mr. Sant Kumar, s/o Sh. Jaichand,
R/o. H.no. 1, Gali no. 2A,
D.C. Bhatta Company, sector - 5,
Gurugram, Haryana.

Complainant

Versus

Athena Infrastructure Ltd.
Address:- M-62,63, 1st floor,
Connaught Place.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vijender Parmar Advocate for the complainant
Shri Rahul Yadav Advocate for the respondent

ORDER

1. A complaint dated 25.07.2018 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 complainant Mr. Sant Kumar, against the promoter M/s Athena Infrastructure Ltd., on account of violation of the clause 21 of the flat buyer's agreement executed on 05.11.2012 in respect of unit no. A



084 on 8th floor, in the project 'Indiabulls engima' for not handing over possession on the due date i.e. on 05.05.2014 which is an obligation under section 11(4)(a) of the Act ibid.

2. Since, the buyer's agreement has been executed on 05.11.2012 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: -

1.	Name and location of the project	"Indiabulls engima", sector-110, Gurugram.
2.	RERA registered/ unregistered.	Registered vide no. 351 of 2017
3.	Apartment/unit no.	A 084, 8 th floor, block A
4.	Apartment measuring area	2605.54 sq. ft. super area
5.	Nature of real estate project	Residential complex
6.	DTCP license no.	Not found in the file
7.	Total area of the project	10.144 acres
8.	Date of booking	01.10.2010
9.	Date of allotment letter	23.04.2013
10.	Date of execution of flat buyer's agreement	05.11.2012
11.	Payment plan	Construction linked payment plan
12.	Total consideration	Rs.1,99,92,998/-
13.	Total amount paid by the	Rs.1,94,12,748/-



	complainant till date	
14.	Percentage of consideration amount	97% (approx.)
15.	Date of delivery of possession as per clause 21 of the flat buyer's agreement dated 05.11.2012 (36 months + 6 months grace period from the date of execution of agreement)	05.05.2016
16.	Delay in handing over possession till date	2 ½ years (approx.)
17.	Penalty clause as per apartment buyer's agreement dated 05.11.2012	clause 21 of the agreement i.e. Rs.5/- per sq. ft. per month of the super area from the date of expiry of said 30 days.
18.	Revised date of delivery of possession as per RERA certificate	31.08.2018 (already expired, however, the respondent has applied for extension wherein the revised date has been mentioned as 31.03.2019)

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. A flat buyer's agreement dated 05.11.2012 is available on record for the aforesaid unit no. A084, 8th floor, block A of the project, according to which the possession of the same was to be delivered by 05.05.2016. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft. per



month of the carpet area of the said flat for the period of such delay as per clause 21 of the agreement dated 05.11.2012. Therefore, the promoter has not fulfilled his committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 13.12.2018. The case came up for hearing on 25.09.2018 and 13.12.2018. The reply has been filed by the respondent which has been perused.

Facts of the complaint: -

6. Briefly stated, the facts relevant for the disposal of the present complainant are that in 2010 the respondent through various medium/means approached the complainant with an offer to invest and buy a flat in their upcoming residential project, namely Indiabulls enigma, located at sector 110, Gurugram.
7. Believing on the representation of the respondent, the complainant for the investment purpose, on 01.10.2010 booked an apartment in the said project by paying Rs.



5,00,000/- as booking amount. In pursuance to the booking of the complainant, respondent vide allotment letter dated 23.04.2013, allotted apartment no. 084 on 8th floor in block A, admeasuring 2605.5 super area with two covered car parking space to the complainant. On 05.11.2012, flat buyer agreement for the allotted apartment was executed between the parties.

8. The total consideration of the apartment no. A 084 was fixed at Rs. 1,99,92,948/- as against which the complainant has made total payment of Rs.1,94,12,748/- under the construction linked payment plan to the respondent on various dates. As per clause 21 of the agreement dated 05.11.2012, possession of the apartment was to be delivered within 36 months plus 6 months' grace period from the date of execution of flat buyer agreement dated 05.11.2012 i.e. by 05.05.2016.

9. The complainant alleged that the respondent has issued allotment letter dated 23.04.2013 and executed the flat buyer's agreement dated 05.11.2012 after a delay of more than 2 years on repeated follow ups and requests of the



complainant. It was further alleged by the complainant that respondent has increased the per sq. ft. sales price of the flat from 5,000/- per sq. ft. (as assured at the time of booking) to Rs. 5,176.74/- per sq. ft. at the time of execution of flat buyer agreement dated 05.11.2012 without giving any sufficient explanation for such change which is unfair trade practices on the part of respondent.

10. The complainant submitted that he has approached the respondent company time and again, but the respondent company has failed to respond to the complainant's queries and has not delivered the possession of the allotted unit till date. Due to aforesaid acts of non-delivery of possession as per the commitment, the complainant is under additional financial of paying of rents for alternative accommodation. Hence, the complainant is constrained to file the present complaint.



Issues to be decided: -

- i. Whether the document titled 'flat buyer agreement' is one sided, unilateral and signed by the complainant under duress and coercion?

- ii. Whether the complainant is entitled for refund of sale consideration with compound interest @ 18% p.a.?
- iii. Whether the respondent is liable to be prosecuted for contravening section 11,12, 14 and 15 of the Real Estate (Regulation and Development) Act, 2016?
- iv. Whether the respondent is liable to pay the monthly rent paid by the complainant after expiry of the due date of delivery of possession as per the agreement and also liable to pay compensation regarding enhancement of basic sale price unilaterally?

Reliefs sought:-

11. The complainant is seeking the following relief:
 - a) Direct the respondent to return/refund Rs. 1,94,12,748/- as paid by the complainant alongwith future and pendent lite compounding interest @ 18% p.a. from the date of payment till realization.
 - b) Direct the respondent to pay Rs. 55,000/- as cost of litigation.



Note - During the pendency of complaint, the complainant vide application titled amendment to the complaint stated that he did

not intend to withdraw from the project and further reserve his rights seeking compensation from the promoter by filing a separate application before the adjudicating officer, if required.

Respondent's reply: -

12. The respondent has raised preliminary objections that the instant complaint is not maintainable, on facts or in law and is liable to be dismissed at the threshold under the provisions of the RERA Act to be adjudicated only before the adjudicating officer.

13. The respondent contended that the complainant is guilty of 'suppressio very and suggestion falsi' and concealed the material facts that he has already filed a consumer complaint before NCDRC for the baseless grievance against the respondent and thus try to mislead the authority. The instant complaint filed by the complainant before the hon'ble authority is liable to dismissed in view of section 71(1) of RERA Act, 2016, which specifically states that any consumer/complainant who has already filed a complaint before the consumer court/commission and is pending, I such eventuality such consumer/complainant would have to



withdraw his complaint with permission from the ld. consumer court/commission to file an application before the adjudicating officer for adjudication of his dispute, as per the Act. Thus, in view of aforesaid settled law under the Act, the present complaint is not maintainable before this authority and the same is mandatorily be filed before the adjudicating officer.

14. The respondent further contended that the relationship between the complainant and the respondent is to be governed by the terms of agreement date 05.11.2012 executed between the parties. The complainant is falsifying his claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainant with malafide intention have not disclosed, infact, concealed the material fact that he was a willful defaulter since the beginning and did not paying his installment on time as per the payment schedule.

15. The respondent submitted that they have already completed the construction of tower A and has also obtained the occupation certificate for the said tower and in the process of



initiating the procedure of handing over possession of the units of tower A to its respective buyers.

16. The respondent further submitted that the delay in delivering the possession was beyond the control of the respondent since number of approvals have to be taken from various authorities. In addition the problem related to labour/raw material and government restrictions including the National Green Tribunal which imposed ban on the construction in Delhi- NCR for several months, the respondent kept on the work moving steadily. The complainant has made false and baseless allegations with a mischievous intention.

17. It was stated by the respondent that the agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. flat buyer agreement dated 05.11.2012 executed much prior to coming into force of the RERA 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 said Act and said rules and no other agreement, whereas, the FBA



being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainant on the basis of new agreement to sell as per RERA Act, 2016.

18. The respondent contended that the complainant has failed to substantiate his allegation regarding the delay in delivery of possession. There is no cause of action in favour of the complainant to institute the present complaint.

Determination of issues:-

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

19. With respect to the **first issue** raised by the complainant, the authority came across that as per clause 21 of flat buyer's agreement dated 05.11.2012, the possession of the flat was to be handed over within 36 months plus 6 months' grace



period from the date of execution of agreement. Therefore, the due date of handing over possession on computation came out to be 05.05.2016. Accordingly, the due date of possession was 05.05.2016 and the possession has been delayed by two years and seven months. The respondent in their reply has stated that the construction has been delayed due to lack of manpower, labour skill and other government restrictions. The delay compensation payable by the respondent @ Rs. 5/- per sq. ft. per month of the carpet area of the said apartment as per clause 21 of flat buyer's agreement 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 Ors. (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."



20. As the possession of the flat was to be delivered by 05.05.2016, as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. However, the complainant has failed to adduce any documentary evidence in support of his allegation that the agreement has been signed by the complainant under duress and coercion.

21. With respect to the **second, third and fourth issues** raised by the complainant, as the promoter has failed to fulfil his obligation under section 11(4)(a) by not delivering the possession within stipulated period i.e. by 05.05.2016, the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.



Findings of the authority:-

22. 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.

23. As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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.

24. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

34 (f) Function of Authority -



To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

25. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

Decision and directions of the authority:-

25. During the course of arguments, learned counsel for the respondent apprised that they had already received the occupation certificate on 06.04.2018 and they had sent possession letter to the complainant/buyer on 03.07.2018, whereas learned counsel for the complainant has stated that he had received a copy of offer of possession letter on 27.11.2018 only.

26. As per clause 21 of the flat buyer's agreement dated 05.11.2012, for unit no. A084,8th floor in Indiabulls enigma, sector-110, Gurugram possession was to be handed over to



the complainant within a period of 36 months plus 6 months' grace period which comes out to be 05.05.2016. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs. 1,94,12,748/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% p.a. with effect from 05.05.2016 till the date of offer of possession i.e. 03.07.2018 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016.

27. 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) The respondent is duty bound to pay the interest at the prescribed rate i.e. 10.75% for every month of delay on the amount paid by the complainant.
- (ii) The respondent is directed to pay interest accrued from 05.05.2016 to 03.07.2018 on account of delay



in handing over of possession to the complainant amounting to Rs. 45,11,070.56/- within 90 days from the date of decision.

(iii) Thereafter, the monthly payment of interest i.e. Rs.1,73,905.87/- till handing over of the possession, so accrues shall be paid before 10th of subsequent month.

28. Order is pronounced.

Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:-

HARERA
GURUGRAM



Judgement Uploaded on 08.01.2019