

PROCEEDINGS OF THE DAY

Day and Date	Friday and 07.12.2018
Complaint No.	547/2018 Case Titled As Mr. Sunil Kumar V/S M/S Varali Properties Ltd.
Complainant	Mr. Sunil Kumar
Represented through	Shri Vaibhav Suri Advocate for the complainant.
Respondent	M/S Varali Properties Ltd.
Respondent Represented through	Shri Rahul Yadav Advocate for the respondent
Last date of hearing	13.9.2018
Proceeding Recorded by	Naresh Kumari

Proceedings

Arguments heard.

As per clause 21 of the Builder Buyer Agreement dated 21.12.2012 for unit No.D091, 9th floor, Tower-D, "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 **21.6.2016**. However, the respondent has not delivered the unit so far. Complainant has already paid Rs.2,04,46,518 /- to the respondent.

Project was registered but the date of completion of project has elapsed on 31.8.2018 as per registration certificate. 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 **21.6.2016** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the handing over the offer of possession.

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)
7.12.2018

Subhash Chander Kush
(Member)
7.12.2018

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

Complaint No. : 547 of 2018
Date of first hearing : 13.09.2018
Date of Decision : 07.12.2018

Mr. Sunil Kumar
R/o A-414, Defence Colony,
New Delhi-110024

...Complainant

Versus

M/s Varali Properties Ltd.
Office at: M-62 & 63, First floor,
Connaught Place, New Delhi-110001

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Sh. Vaibhav Suri
Sh. Rahul Yadav

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 18.07.2018 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 complainant Mr. Sunil Kumar, against the promoter M/s Varali Properties Ltd. on account of violation of clause 21 of the flat buyer's agreement



executed on 21.12.2012 for unit no. D091 on 9th floor, tower 'D', admeasuring super area of 3400 sq. ft. in the project "Indiabulls Enigma" for not giving possession on the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the buyer's agreement has been executed on 21.12.2012 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 are as under: -

1.	Name and location of the project	"Indiabulls Enigma" in Sector-110, Village Pawala Khusrupur, District Gurugram
2.	Nature of real estate project	Residential complex
3.	Unit no.	D091, 9 th floor, tower 'D'
4.	Project area	19.856 acres
5.	Registered/ not registered	Registered (351 of 2017)
6.	Revised date of completion as per RERA registration certificate	31.08.2018 Note: This has already expired.



7.	DTCP license	213 of 2007 dated 05.09.2007, 10 of 2011 dated 29.01.2011 and 64 of 2012 dated 20.06.2012
8.	Date of booking	27.12.2011 (as per applicant ledger in annexure-4, pg 85 of the complaint)
9.	Date of flat buyer's agreement	21.12.2012 Note: The agreement was entered into with first buyer and thereafter an endorsement was made in favour of the complainant
10.	Total consideration	BSP- Rs. 1,93,00,000/- (as per agreement) Rs. 2,09,11,000/- (as per applicant ledger in annexure-4, pg 85 of the complaint)
11.	Total amount paid by the complainant	Rs. 2,04,46,518/- (as per applicant ledger in annexure-4, pg 86 of the complaint)
12.	Payment plan	Construction linked payment plan
13.	Date of delivery of possession	Clause 21 – 3 years from date of execution of agreement + 6 months grace period i.e. 21.06.2016
14.	Delay of number of months/ years upto 07.12.2018	2 years 5 months
15.	Penalty clause as per flat buyer agreement dated 21.12.2012	Clause 22- Rs. 5/- per sq. ft. per month of the super



	area
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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's agreement dated 21.12.2012 is available on record for unit no. D091 on 9th floor, tower 'D', admeasuring super area of 3400 sq. ft. according to which the possession of the aforesaid unit was to be delivered by 21.06.2016. The promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 07.12.2018. The reply has been filed on behalf of the respondent and has been perused.

Facts of the complaint

6. On 27.12.2011, the first buyer/original allottee, Mr. Rohit Sud booked a unit in the project named "Indiabulls Enigma" in Sector-110, Village Pawala Khusrupur, District Gurugram by paying an advance amount of Rs. 5,00,000/- to the respondent. Accordingly, the complainant was allotted a unit bearing no. D091 on 9^h floor, tower 'D'. Thereafter, on



21.12.2012, a flat buyer agreement was executed between the first buyer and the respondent.

7. The complainant submitted that the representatives of Indiabulls Real Estate Ltd. represented to the complainant that Indiabulls is developing the above project through its 100% subsidiary Varali Properties Ltd. Thereafter, the complainant purchased the said flat in question from the first buyer/original allottee, Mr. Rohit Sud. The complainant after making substantial payment to the said original allottee stepped in his shoes. The respondent endorsed the flat buyer agreement dated 21.12.2012 in favour of the complainant and further endorsed all the payment receipts in favour of the complainant which was earlier issued in favour of the first buyer. Pursuant to this, the respondent further issued an allotment letter dated 31.10.2013 in favour of the complainant.

8. As per clause 21 of the flat buyer agreement dated 21.12.2012, the possession should have been offered within 3 years from date of execution of agreement + 6 months grace period i.e. by 21.06.2016. However, till date the possession of the said unit has not been handed over to the complainant despite making all requisite payments as per the demands



raised by the respondent. The complainant made payments of all instalments demanded by the respondent amounting to a total of Rs. 2,04,46,518/-.

9. The complainant submitted that he has paid a total sum of Rs. 2,04,46,518/- towards the aforesaid residential flat in the project from December, 2011 to September, 2015 as and when demanded by the respondent. During the execution of the flat buyer agreement, the respondent/ promoter had endorsed the payment receipts in favour of the complainant which were previously in the name of earlier allottee. It is pertinent to state that the respondent collected more than 95% of the sale consideration by December 2011 till September 2015, which is also in terms with the construction linked payment plan, however despite collecting 95% payment, the respondent/ promoter miserably failed to offer the possession of the flat in question till date.

10. The complainant submitted that the project Indiabulls Enigma comprises of towers A to J. The tower D is being developed by subsidiary of Indiabulls namely Varali Properties Ltd. and whereas the other towers i.e. A to C and E to J are being developed by another subsidiary of the respondent namely Athena Infrastructure Ltd. It was



presented to the complainant that towers A to D will have 17 floors. However, during the construction the respondent and Athena Infrastructure Ltd. changed the original plan and revised the same to the detriment of the complainants and unilaterally increased 4 floors in towers A to D. The increase in floors/increase in FAR changed the entire theme of the project; it shall ultimately disturb the density of the colony and its basic design attraction; it will create an extra burden on the common amenities and facilities.

11. The complainant submitted that the respondent increased the saleable area much more than was originally represented by them, which will lead to a strain on the common facilities like open areas, car parking space, club facilities, swimming pool usage, as with an increase in population density, the ease of the use of common facilities is seriously compromised against the interest of the complainant. Moreover, the strength of the structure of tower A to D has been compromised, the foundation designed and built for 17 floors would not withstand the additional load of 4 floors.

12. The complainant submitted that the respondent did not seek his consent for increasing the floors and increased the floors in a secretive manner. It is stated that the enhancement of



FAR is in total violation of representations made in the respondent's advertisement material displayed at site as well as on the internet.

13. The complainant submitted that regarding increasing the FAR, the respondent released the said change in plan in a non-descript newspaper(s) advertising. This unconscionable act is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. In this regard, it is pertinent to note that the respondent has the complete contact details including phone numbers and email ID of the complainant where it has been doing regular communication, yet the respondent never communicated any intention or actions to revise the sanctioned building plans. It is worthwhile to mention that the respondent has been sending various communications and demands, vide emails, but the respondent conveniently avoided to take approval of the complainants for the major changes in sanction plans, which has changed the fundamental nature of the project.

14. It is submitted that the complainant has made visits at the site and observed that there are serious quality issues with respect to the construction carried out by respondent till



now. The flats were sold by representing that the same will be luxurious apartment. However, all such representations seem to have been made in order to lure complainant to purchase the flats at extremely high prices. The respondent has compromised with levels of quality and are guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartments, but, they have compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard low grade defective and despicable construction quality.

15. The complainant submitted that the respondent has illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. The complainant after gaining fact about illegal collection of EDC/IDC on numerous occasions approached the respondent at its premises and requested for the refund of excess amount, thereafter the respondent/ promoter finally on 15.08.2016 adjusted the excess amount of Rs. 3,01,500/-. The respondent did not pay any interest to the complainant on the amount of Rs. 3,01,500/- which the



respondent had illegally withheld for more than two years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax.

16. The complainant submitted that despite repeated calls, meetings and emails sent to the respondent, no definite commitment was shown to timely completion of the project and no appropriate action was taken to address the concerns and grievances of the complainant.

17. Issues raised by the complainant

- I. Whether the respondent/ promoter made false representations about the project in question in order to induce the complainant to make a booking?
- II. Whether the respondent/ promoter has unjustifiably delayed the construction and development of the project in question?
- III. Whether the respondent/ promoter is liable to pay the delay interest @18% p.a., along-with compensation till the time possession is handed over to the complainant?
- IV. Whether the respondent/ promoter has over charged EDC, IDC?



- V. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
- VI. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax and PLC?

18. Relief sought

- I. Award delay interest @ 18% p.a. for every month of delay, till the handing over of possession of the apartment complete in all respect, to the complainant;
- II. Direct the respondent to rectify the breaches with regard to extra EDC /IDC charges, wrongfully charging of parking charges, VAT, service tax, PLC as well as for wrongfully inflating the super area.

Respondent's reply

19. The respondent submitted that present complaint is not maintainable before the authority and also devoid of any merits, which has been preferred with the sole motive to harass the respondent. In fact the Complainants are guilty of **“suppressio veri”** and **“suggestio falsi”** and has in fact concealed the true facts about their approaching the National



Consumer Dispute Redressal Commission (NCDRC) for the baseless grievances against the Respondent and thus try to mislead the hon'ble authority. That the instant complaint filed by the complainant before the hon'ble authority is liable to be dismissed in view of Section 71 (1) of RERA 2016, which specifically states that any customer/ complainant who has already filed a complaint before the ld. consumer forum/ commission(s) and is pending, in such eventuality such customer(s)/complainant(s) will have to withdraw his complaint with permission from the ld. consumer forum(s)/commission(s) to file an application before the adjudicating officer for adjudication of his dispute, as per the Act.

20. The respondent submitted that the complainant is the subsequent allottee of the unit in question on 22.10.2013 and therefore, the complainant is not entitled to any relief stated in the complaint. It is pertinent to mention that when the complainant purchased the said unit, he was well aware of the construction work/actual status carried out on the project site and thus, now he cannot come before this authority for delay in handing over possession. Infact, the complainant was aware at the time of purchase that time for



performance was not stipulated as the essence of the contract and the original allottee had accepted the delay.

21. The respondent further submitted that during repurchase, the builder had not assured the complainant that he would give possession to them by the original date stipulated in the agreement. Therefore the complainant cannot be treated at par with the original allottees. It is a settled principle of law that a subsequent allottee cannot claim the rights available to the first buyer. The above version of the respondent is further supported and held by the hon'ble Supreme Court in **HUDA Vs. Raje Ram** that the re-allottees or subsequent allottees cannot be held to be at par with the original allottees who had originally booked their respective units, also similar view has been taken by **NCDRC in "Inder K Chawla Vs. Unitech & another."**

22. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact and law. The respondent denies them *in toto*. 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 *in limini*.



23. The respondent submitted that the complainant with malafide intention has not disclosed, rather concealed the material fact from this hon'ble authority that the complainant has been a wilful defaulter since the beginning, not paying his instalments on time as per the construction link plan opted by him. It is stated that the complainant has not come before this hon'ble authority with clean hands and wishes to take advantage of his own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers and not defaulters, like the complainant in the present complaint.

24. The respondent further submitted that the delay in delivering the possession of the flat to the complainant was beyond the control of the respondent, since for completing a project number of permissions and sanctions are to be required from numerous government authorities which were delayed with no fault of the respondent. In addition to the delay in obtaining permissions/sanctions from the government authorities, national green tribunal imposed a ban on carrying out constructions in Delhi-NCR for several months. Further there were problems related to labour/ raw material. Despite everything the respondent kept the project moving steadily and has already completed the construction of tower



D of the project and has also applied for grant of occupation certificate before the concerned authority for the tower in question and the same shall be obtained by the respondent in short span of time enabling the respondent to hand over the possession of the unit in question to the complainant. The respondent has specifically mentioned all the above contingencies in the agreement and incorporated them in clause 39 of the agreement. Further, the other additional reasons of delay include:

- (i) Lack of the 150 meter wide external road to be provided by the government as per the sector plan/ master plan;
- (ii) Lack of 24 meter wide service road as proposed in the master plan;
- (iii) In fact till date the govt. has not acquired the green belt and the above mention 24 meter wide road giving access/ connectivity to the entry of the project;

25. The respondent submitted that he has made huge investments in obtaining requisite approvals and carrying on the construction and development of 'Indiabulls Enigma' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by respondent by investing all the monies that it



has received from the buyers / customers and through loans that it has raised from financial institutions. In spite of the fact that the real estate market has gone down badly, the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers / promoters who have started the project around similar time period and have abandoned the project due to such reasons.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

26. In respect of the **first issue** raised by the complainant, the complainant has failed to furnish any concrete proof in order to prove any false representation the part of respondent in



order to induce the complainant to make a booking, wherein the complainant was actually the second buyer of the flat in question and did not purchase the apartment directly from the respondent.

27. In respect of the **second and third issue** raised by the complainant, the authority is of the view that the respondent has delayed the delivery of possession of the booked unit. This is fortified from the fact that as per clause 21 of the agreement dated 21.12.2012, 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 21.06.2016 which has already lapsed but the possession has not been delivered till date and therefore, the respondent is liable to pay interest on the delayed possession. Thus the complainant is entitled for interest on the delayed possession at the prescribed rate of 10.75% p.a. under the Act. Delay charges will accrue from the due date of possession i.e. 21.06.2016 till the offer of possession.

28. In respect of the **fourth issue** raised in the complaint, the complainant was well aware about the lawful dues to be paid towards EDC/IDC. As per clause 6(vii) of the flat buyer's agreement, the respondent can charge revised EDC/IDC



charges with retrospective effect as imposed by the central or state government or any other authority. Thus, EDC/IDC has been charged as per the terms of the agreement and thus, the issue is decided in negative.

29. In respect of **fifth and sixth issue** raised by the complainant, the respondent has submitted in his reply that the extra floors have no bearing on the amount paid by the complainant and it is denied that the increase in floors/FAR has changed the theme of the project or that it shall disturb the density of the colony. Further, as per clause 18 of the flat buyer's agreement, the floor plans were tentative and were liable to be changed, altered, modified, revised, added, deleted, substituted or recast during the course of the construction and the complainant agreed to the same. Thus, it cannot be said that the respondent has wrongfully resorted to increase in floors/FAR or has artificially inflated measurable super area. Further, the payments have been collected the respondent as per the payment plan as agreed by the complainant and the complainant has failed to furnish any material particulars in order to prove that he has been wrongfully charged service tax or PLC. Hence, these issues are decided in negative.



30. The terms of the agreement are drafted mischievously by the respondents as in this case 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.”

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

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.

32. 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

33. **Jurisdiction of the authority-** The project “Indiabulls Enigma” is located in Sector-110, Village Pawala Khusrupur, District Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding 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.

34. As per clause 21 of the flat buyer agreement dated 21.12.2012, the due date of possession was 21.06.2016.



however, the respondent has failed in handing over possession of the unit in question. It is pertinent to mention here that the project is registered with the authority and as per the registration certificate, the revised date for completion of project undertaken by the respondent was 31.08.2018, which has already elapsed. The project is badly delayed. Keeping in view the status of the project, intervening circumstances and the interest of the allottees, the authority is of the view that complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 21.6.2016 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till the handing over the offer of possession.

Decision and directions of the authority

35. 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 respondents:

- (i) The respondent is directed to pay the interest at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainant.
- (ii) The respondent is directed to pay interest accrued from 21.06.2016 to 07.12.2018(date of this order) on account of delay in handing over of possession to the complainant



amounting to Rs.54,08,185.50/- within 90 days from the date of order.

(iii) Thereafter, the monthly payment of interest i.e. Rs.1,83,166.72/- till handing over of the possession so accrued shall be paid before 10th of subsequent month.

36. The complaint is disposed of accordingly.

37. The order is pronounced.

38. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Date: 07.12.2018

Judgement Uploaded on 08.01.2019



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