

**PROCEEDINGS OF THE DAY**

Day and Date	Tuesday and 11.12.2018
Complaint No.	587/2018 Case titled as Mr. Jayanti Lal Patel & Anr V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Jayanti Lal Patel & 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	20.9.2018
Proceeding Recorded by	Naresh Kumari

**Proceedings**

**Project is registered with the authority.**

Arguments heard.

A Flat Buyer Agreement was executed inter-se the parties on 3.9.2011 for unit measuring 3400 square feet. However, at lateral stage, unit was changed and an another Flat Buyer Agreement was executed inter-se the parties on 23.4.2014 and as such, the terms and conditions of earlier BBA may be Osmosis which is not tenable as earlier BBA has gained nullity in the eyes of law. The terms of new BBA will prevail for all terms and conditions.

As per clause 21 of the Builder Buyer Agreement dated 23.4.2014, for unit No.C163, 16<sup>th</sup> floor, Tower-C, measuring 3350 square feet in Indiabulls Enigma, 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 **23.10.2017**. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,90,98,091 /- against total sale consideration amount of Rs.1,96,43,750 /-.

Project is registered and revised date of possession expired on 31.8.2018. However, respondent has applied for extension of registration wherein extension extended upto March 2019. As such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f **23.10.2017** 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 of the amount with 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 is disposed of accordingly. Detailed order will follow. File be consigned to the registry.

Samir Kumar  
(Member)

Subhash Chander Kush  
(Member)

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

**Complaint no. : 587 of 2018**  
**Date of first hearing : 20.09.2018**  
**Date of decision : 11.12.2018**

1. Mr. Jayanti Lal Patel
2. Sangeeta Jayantilal Patel

Both R/o Flat no. 401, Tower, Sky Terrace,  
The Palm Drive, Sector-66,  
Golf course extension road,  
Gurugram, Haryana-122001

**...Complainants**

Versus सत्यमेव जयते

M/s Athena Infrastructure Ltd. (through its  
Managing Director)  
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 complainants  
Advocate for the respondent

**ORDER**

1. A complaint dated 24.07.2018 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 complainants Mr. Jayanti Lal Patel and Mrs. Sangeeta Jayantilal Patel, against the promoter M/s Athena Infrastructure Ltd. on account of violation of clause 21 of the flat buyer's agreement executed on 23.04.2014 for unit no. C163 on 16<sup>th</sup> floor, tower 'C', admeasuring super area of 3350 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 23.04.2014, 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.	C163, 16 <sup>th</sup> floor, tower 'C'



4.	Project area	15.6 acres
5.	Registered/ not registered	<b>Registered (351 of 2017)</b>
6.	Revised date of completion as per RERA registration certificate	<b>31.08.2018</b> <b>Note: This has already expired. However, the respondent has applied for extension wherein the revised date has been mentioned as March, 2019.</b>
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.	Approval of revised building plan	23.08.2013
9.	Date of booking	01.07.2011 (as per applicant ledger in annexure-4, pg 110 of the complaint)
10.	Date of flat buyer's agreement	23.04.2014 <b>Note: A FBA was executed for flat no. B071 between parties on 03.09.2011. However, later unit was changed to C163 and another FBA was executed for the same on 23.04.2014.</b>
11.	Total consideration	BSP- Rs. 1,76,85,000/- (as per agreement) Rs. 1,96,43,750/- (as per applicant ledger in annexure-4, pg 110 of the complaint)



12.	Total amount paid by the complainant	Rs. 1,90,98,091/- (as per applicant ledger in annexure-4, pg 110 of the complaint)
13.	Payment plan	Construction link payment plan
14.	Date of delivery of possession	Clause 21 – 3 years from date of execution of agreement + 6 months grace period i.e. <b>23.10.2017</b>
15.	Delay of number of months/ years upto 11.12.2018	1 year 2 months (approx.)
16.	Penalty clause as per flat buyer agreement dated 23.04.2014	Clause 22- Rs. 5/- per sq. ft. per month of the super area

4. The details provided above have been checked on the basis of the record available in the case file which has been provided by the complainants and the respondent. A flat buyer's agreement dated 23.04.2014 is available on record for unit no. C163 on 16<sup>th</sup> floor, tower 'C', admeasuring super area of 3350 sq. ft. according to which the possession of the aforesaid unit was to be delivered by 23.10.2017. The promoter has failed to deliver the possession of the said unit to the complainants. 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 for appearance.



The case came up for hearing on 20.09.2018 and 11.12.2018. The reply has been filed on behalf of the respondent and the same has been perused.

### **Facts of the complaint**

6. The complainants submitted that the representatives of Indiabulls Real Estate Ltd. represented to the complainants that Indiabulls is developing the above project through its 100% subsidiary Athena infrasturcture Ltd., subsequent to which a pre-printed flat buyer agreement dated 03.09.2011 was executed between the parties and vide aforesaid FBA the respondent earlier allotted flat bearing no. B-071 on 7<sup>th</sup> floor in tower No. B, admeasuring super area of 3400sq.ft. to the complainants.
7. The complainants submitted that the complainants have paid a total sum of Rs. 1,90,98,091/- towards the aforesaid residential flat in the project from April, 2011 to September, 2014 as and when demanded by the respondent. It is pertinent to state that the respondent collected more than 95% of the sale consideration by April, 2011 till September, 2014, 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. It is submitted that the complainants had shifted their unit from B-071 to C-163 and accordingly a fresh BBA was executed between the parties on 23.04.2014. It is further submitted that the period of 36 months mentioned in BBA dated 23.04.2014 does not have any meaning and 36 months period ought to be calculated from the first payment as even the respondent has endorsed all the payment receipts to the extent that the payment made till April 2014 shall treated as payment made towards flat bearing no. C-163.

8. As per clause 21 of the flat buyer agreement dated 23.04.2014, the possession should have been offered within 3 years from date of execution of agreement + 6 months grace period i.e. by 23.10.2017. However, till date the possession of the said unit has not been handed over to the complainants despite making all requisite payments as per the demands raised by the respondent. The complainants made payments of all instalments demanded by the respondent amounting to a total of Rs. 1,90,98,091/-.

9. The complainants 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 complainants 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.

10. The complainants 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 complainants. 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.



11. The complainants submitted that the respondent did not seek their 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.
12. The complainants 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.



13. It is submitted that the complainants have 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 complainants to purchase the flats at extremely high prices. The respondent has compromised with levels of quality and is 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.



14. The complainants 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 complainants 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 05.08.2016 adjusted the excess amount of Rs. 3,01,500/-. The respondent did not pay any interest to the complainants 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.

**15. Issues raised by the complainants**

- I. **Whether the respondent/ promoter made false representations about the project in question in order to induce the complainants 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 complainants?**
- 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?**

**16. 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 complainants;**
- II. **Direct the respondent to provide the schedule of construction and also 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**

17. 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. Infact 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 complainants 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 Id. 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 Id. consumer forum(s)/commission(s) to file an application before the adjudicating officer for adjudication of his dispute, as per the Act.

18. 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*.

19. The respondent submitted that the complainants with malafide intention has not disclosed, rather concealed the material fact from this hon'ble authority that the





complainants have been a wilful defaulter since the beginning, not paying his instalments on time as per the construction link plan opted by them. It is stated that the complainants have not come before this hon'ble authority with clean hands and wishes to take advantage of their 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 complainants in the present complaint.

20. The respondent further submitted that he has already completed the construction of the tower 'C' in question and will be applying for grant of occupation certificate in a short span of time for the said tower. The delay in delivering the possession of the flat to the complainants were 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. 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 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;

21. 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:

22. In respect of the **first issue** raised by the complainants, the complainants have failed to furnish any concrete proof in order to prove that any alleged false representation has been made on the part of respondent in order to induce the complainants to make a booking, wherein the complainants were actually the second buyer of the flat in question and did not purchase the apartment directly from the respondent.
23. In respect of the **second and third issue** raised by the complainants, 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 23.04.2014, 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 23.10.2017 which has already lapsed but the respondent has failed to deliver the possession till date and therefore, the respondent is liable to pay interest on the delayed possession. Thus, the complainants are 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. 23.10.2017 till the offer of possession.

24. In respect of the **fourth issue** raised in the complaint, the complainants were well aware about the lawful dues to be paid towards EDC/IDC. As per clause 6(vii) of the flat buyer's agreement dated 23.04.2014, 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.

25. In respect of **fifth and sixth issue** raised by the complainants, the respondent has submitted in his reply that



the extra floors have no bearing on the amount paid by the complainants 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 complainants 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 complainants and the complainants have failed to furnish any material particulars in order to prove that they have been wrongfully charged service tax or PLC. Hence, these issues are decided in negative.



26. 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.”*

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

The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

28. The complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.

#### **Findings of the authority**

29. **Jurisdiction of the authority-** The project “Indiabulls Enigma” is located in Sector-110, Village Pawala Khusrupur, District Gurugram. 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 complainants at a later stage.

30. As per clause 21 of the flat buyer agreement dated 23.04.2014, the due date of possession was 23.10.2017. 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. However, respondent has applied for extension of registration wherein extension extended upto March 2019. Keeping in view the status of the



project, intervening circumstances and the interest of the allottees, the authority is of the view that complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 23.10.2017 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**

31. 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:

- (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 complainants.
- (ii) The respondent is directed to pay interest accrued from 23.10.2017 to 11.12.2018(date of this order) on account of delay in handing over of possession to the complainants amounting to Rs.22,80,380/- within 90 days from the date of order.
- (iii) Thereafter, the monthly payment of interest i.e. Rs.1,71,087.08/- till handing over of the possession so accrued shall be paid by the respondent before 10<sup>th</sup> of subsequent month.



32. The complaint is disposed of accordingly.
33. The order is pronounced.
34. Case file be consigned to the registry.

**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 11.12.2018

Judgement Uploaded on 08.01.2019



HARERA  
GURUGRAM

