

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 13.12.2018
Complaint No.	607/2018 Case titled as Mr. Baldev Raj Kapoor V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Baldev Raj Kapoor
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

Arguments heard.

Project was registered with the authority vide No. 351 of 2017 which has expired on 31.8.2018. Counsel for the respondent stated that they have applied for extension of registration which is pending with the authority. The re-revised date of delivery of possession is March 2019. Project is badly delayed.

As per clause 21 of the Builder Buyer Agreement dated 20.7.2011 for unit No.B092, 9th 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 **20.1.2015**.

However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,99,31,777/- to the respondent.

Complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **20.1.2015** 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)

Subhash Chander Kush
(Member)

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

Complaint No. : 607 of 2018
Date of first hearing : 25.09.2018
Date of Decision : 13.12.2018

Sh. Baldev Raj Kapoor

R/o Kapoor Sales Corporation, J-424, First
floor, Shankar road, New Rajinder Nagar,
New Delhi-110060

...Complainant

Versus

M/s Athena Infrastructure 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. Vijender Parmar Advocate for the complainants
Sh. Rahul Yadav Advocate for the respondent



ORDER

1. A complaint dated 25.07.2018 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 Sh. Baldev Raj

Kapoor, against the promoter M/s Athena Infrastructure Ltd. on account of violation of clause 21 of the flat buyer's agreement executed on 20.07.2011 for unit no. B092 on 9th floor, tower 'B', 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 20.07.2011, 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 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.	B092, 9 th floor, tower 'B'
4.	Project area	15.6 acres
5.	Allotted area of the flat	3400 sq. ft.



6.	Registered/ not registered	Registered (351 of 2017)
7.	Revised date of completion as per RERA registration certificate	31.08.2018 Note: This has already expired. However, respondent has applied for extension mentioning the revised date as March, 2019.
8.	DTCP license	213 of 2007 dated 05.09.2007, 10 of 2011 dated 29.01.2011 and 64 of 2012 dated 20.06.2012
9.	Date of booking	28.10.2010 (as per applicant ledger in annexure-C3, pg 84 of the complaint)
10.	Date of flat buyer's agreement	20.07.2011
11.	Total consideration	BSP- Rs. 1,79,39,998/- (as per agreement) Rs. 2,02,64,998/- (as per applicant ledger in annexure-C3, pg 84 of the complaint)
12.	Total amount paid by the complainant	Rs. 1,99,31,777/- (as per applicant ledger in annexure-C3, pg 85 of the complaint)
13.	Payment plan	Construction Link Payment Plan (as per agreement, pg 76 of the complaint)
14.	Date of delivery of possession	Clause 21 – 3 years from date of execution of agreement + 6 months grace period i.e. 20.01.2015



15.	Delay of number of months/ years upto 13.12.2018	3 years 10 months
16.	Penalty clause as per flat buyer agreement dated 20.07.2011	Clause 22- Rs. 5/- per sq. ft. per month of the super area

3. The details provided above have been checked on the basis of the record available in the case file which has been provided by the complainant and the respondent. A flat buyer's agreement dated 20.07.2011 is available on record for unit no. B092 on 9th floor, tower 'B', admeasuring super area of 3400 sq. ft. according to which the possession of the aforesaid unit was to be delivered by 20.01.2015. The promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability till date.

4. 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 25.09.2018 and 13.12.2018. The reply has been filed by the respondent and the same has been perused.



Facts of the complaint

5. On 28.10.2010, the complainant 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 and the other two co-allottees were allotted a unit bearing no. B092 on 9th floor, tower 'B'.

6. The complainant submitted that somewhere in the end of 2010, the respondent through its marketing executives and advertisement through various means approached the complainant with an offer to invest and buy a flat in the proposed project of respondent namely "Indiabulls Enigma". It was 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 complainant 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 complainant 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 assured that the allotment letter and flat buyer's agreement for the said project would



be issued to the complainant within one week of booking to be made by the complainant.

7. The complainant submitted that the respondent did not fulfill its promise and assurance and issued only the application form, despite repeated requests and reminders of the complainant to issue the allotment letter and flat buyer's agreement. In the said application form, the price of the said flat was agreed at the rate of Rs. 5,100/- per sq. ft. along-with Rs.3,00,000/- as cost of car parking 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 or modification in the area or sale price of the said flat from the area or the price committed, assured and promised by the respondent in the said application form or agreed otherwise.

8. The complainant submitted that thereafter, the respondent started raising the demand of money /instalments from the complainant, which was duly paid by the complainant as per agreed timelines and along-with the making of payments, complainant time and again requested the respondent to execute the flat buyer's agreement as per its promise and



assurance but the respondent intentionally delayed the execution of the flat buyer's agreement for more than one year.

9. The complainant submitted that on 20.07.2011, the agreement was executed between the parties. As per clause 21 of the flat buyer agreement dated 20.07.2011, the possession should have been offered within 3 years from date of execution of agreement + 6 months grace period i.e. by 20.01.2015. 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.1, 99,31,777/-.

10. The complainant alleged that at the time of execution of the said agreement, the respondent misusing its dominant position coerced and pressurized the complainant to sign the arbitrary, illegal and unilateral terms of the said flat buyer's agreement and when the complainant 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 complainant as sale



consideration in respect of the said flat and also to cancel his booking. The complainant having no other option, felt helpless and cheated and ultimately, under duress and coercion had to sign 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.5,276.47/- per sq. ft. without giving any sufficient or logical explanation for the same and refused to entertain any objection or request of the complainant in this regard.

11. The complainant submitted that he wrote several emails to the CEO and customer care of the respondent company regarding the arbitrary and illegal increment of the basic sale price in per square foot and objected the same vehemently. However, the respondent did not pay any heed to the request of the complainant and refused to revise the price in any manner or under any circumstances whatsoever as agreed in the provisional application form. The complainant had also delivered a letter by hand in this regard to the respondent mentioning his grievances.

12. The complainant submitted 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 complainant as sale consideration of said flat by not delivering the unit by agreed timelines.

13. The complainant submitted that due to the failure on the part of the respondent to deliver the said flat on time as agreed in the flat buyer's agreement, the complainant was constrained to stay in the rented accommodation by paying monthly rent along-with the monthly installments of home loan taken by him for the aforesaid flat. The complainant has therefore paid Rs.20,40,000/- as rentals @ Rs.40,000/- per month for the rented accommodation for the period of delay i.e. 51 months from April 2014 to July 2018.

14. **Issues raised by the complainant**

The relevant issues as culled out from the complaint are:

- I. Whether the document titled as "flat buyer's agreement" is one sided and unilateral?



- II. Whether the document titled as “flat buyer’s agreement” was signed by the complainant under duress and coercion?
- III. Whether the complainant is entitled for the refund of sale consideration amounting to Rs.1,90,98,118/- paid as sale consideration?
- IV. Whether the complainant is entitled for the compounding interest @ 18% p.a. on the total sale consideration paid by the complainant for the said flats?
- V. Whether the respondent is liable to be prosecuted for contravening section 12 of The Real Estate (Regulation & Development) Act, 2016 for giving incorrect and false statement while selling the said flat to the complainant?
- VI. Whether the respondent is liable to be prosecuted for contravening section 15 of The Real Estate (Regulation and Development) Act, 2016?



VII. Whether the respondent is liable to be prosecuted for contravening section 11 of The Real Estate (Regulation and Development) Act, 2016?

VIII. Whether the respondent is liable to be prosecuted for contravening section 14 of The Real Estate (Regulation and Development) Act, 2016 for non-adherence of sanctioned plans and project specifications?

15. Relief sought

- I. Pass an order to direct the respondent to return/refund an amount of Rs.1,99,31,777/- paid by the complainant as sale consideration of the said flat along-with future and pendent-lite compounding interest @ 18% per annum from the date of payment till its final payment.



Respondent's reply

16. 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 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.

17. 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*.

18. 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.

19. The respondent further submitted that he has already completed the construction of the tower 'B' 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 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.



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;

20. 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:

21. In respect of the **first issue** raised by the complainant, the complainant has not furnished any material particulars in support of his allegation that the agreement is one sided as to in which particular context. However, the authority is of the view that 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.”

22. In respect of the **second issue** raised by the complainant, the complainant has failed to furnish any concrete proof in order to prove any duress or coercion has been exercised by the respondent in order to induce the complainant to sign the flat buyer’s agreement. Moreover, there is no protest letter/email annexed with the paper book that had been served upon the respondent in order to establish that respondent has coerced the complainant.

23. In respect of the **third and fourth issue** raised by the complainant, as per clause 21 of the flat buyer’s agreement, the date of handing over of possession as per clause 21 of the agreement dated 20.07.2011 comes out to be 20.01.2015. however, the respondent failed in handing over the possession within the stipulated time period and even till



date. As per the RERA registration certificate, the date undertaken by the respondent for handing over the possession was 31.08.2018, which has expired. However, the respondent has applied for an extension. In these circumstances, it will not be just to allow refund at this stage. However, the complainant is entitled to delayed possession interest at the prescribed rate of 10.75% per annum from the due date of possession till the actual handing over of possession.

24. In respect of the **fifth, sixth, seventh and eighth issue** raised in the complaint, the flat buyer's agreement was executed on 20.07.2011, much prior to coming into force of the RERA, 2016. Thus, section 12, 15, 11 and section 14 of the Act cannot be applied retrospectively.
25. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.
26. 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.



27. 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

28. **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.

29. As per clause 21 of the flat buyer agreement dated 20.07.2011, the due date of possession comes out to be 20.01.2015 (36 months from date of execution of agreement + 6 months grace period). 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 date of extension is mentioned as extended up to 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 refund cannot be allowed at this stage. However, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 20.01.2015 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

30. 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 from due date of possession till the actual handing over of possession.
- (ii) The respondent is directed to pay interest accrued from 20.01.2015(due date of possession) to 13.12.2018(date of this order) on account of delay in handing over of possession to the complainant amounting to Rs.83,48,570/- within 90 days from the date of order.
- (iii) Thereafter, the monthly payment of interest i.e. Rs.1,78,555.50/- till handing over of the possession so accrued shall be paid before 10th of subsequent month.



Principal amount paid by the complainant	Interest accrued up to date of decision	Monthly interest to be paid till handover of possession
Rs. 1,99,31,777/-	Rs.83,48,570/-	Rs.1,78,555.50/-

31. The complaint is disposed of accordingly.

32. The order is pronounced.

33. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 13.12.2018

Judgement Uploaded on 08.01.2019



HARERA
GURUGRAM

