

PROCEEDINGS OF THE DAY

Day and Date	Friday and 07.12.2018
Complaint No.	548/2018 Case Titled As Mr. Navneet Sarin & Anr V/S M/S Athena Infrastructure Ltd
Complainant	Mr. Navneet Sarin & 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	13.9.2018
Proceeding Recorded by	Naresh Kumari

Proceedings

Arguments heard.

At the time of arguments, it has been alleged by the counsel for the buyer-complainant that builder has offered him possession on **3.7.2018** and he has not resolved the matter w.r.t payment of delayed possession charges i.e. @ 10.75% as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The respondent has rather given him a ledger of account vide which he has adjusted only delayed possession charges as per BBA which is not reasonable and in accordance with law. The builder as well as buyer shall be equitable in charging interest @ 10.75% on

both sides i.e. default of buyer to make payment and delayed possession charges.

Respondent has stated that he had already received occupation certificate on 6.4.2018 and he had sent possession letter to the buyer on 3.7.2018.

As per clause 21 of the Flat Buyer Agreement dated 21.2.2012 for unit No.A094, 9th 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 21.8.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,44,98,122/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f 21.8.2015 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 respondent is directed to act in accordance with the provisions of section 18 (1) of the Act ibid i.e. to adjust the amount @ 10.75% per annum i.e. delayed possession charges. 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)
7.12.2018

Subhash Chander Kush
(Member)

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

Complaint no. : 548 of 2018
First date of hearing: 13.09.2010
Date of decision : 07.12.2018

1.Mr. Navneet Sarin
2.Mrs. Mona Sarin
A 141, LGF, Defence Colony,
New Delhi

Complainant

Versus

M/s Athena Infrastructure Ltd.
Regd. Office: M-62 & 63, first floor,
Connaught Place, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vaubhav Suri

Advocate of complainant

Shri Rahul Yadav

Advocate for the respondent

ORDER

1. A complaint dated 18.07.2018 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. Navneet Sarin and Mrs. Mona Sarin, against the promoter M/s Athena Infrastructure Ltd.in respect of apartment described below in



the project 'India Bulls Enigma', on account of violation clause 21 of the builder buyer agreement dated 21.02.2012 in respect of unit no. A049, 9th floor with respect to super area of 3400 sq. ft. for not handing over possession on due date i.e. 21.08.2015 which is an obligation under section 11(4)(a) of act ibid.

2. Since, the buyer's agreement has been executed on 21.02.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot 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	India bulls enigma
2.	Nature of the project	Residential
3.	RERA registered/ not registered.	Registered (351 of 2017)
4.	Revised date of completion as per registration certificate	31.08.2018
5.	Apartment/unit no.	A094,9 th floor, block A
6.	Apartment measuring	3400 sq. ft.
7.	Payment plan	Construction linked payment plan



8.	Date of execution of buyer's agreement	21.02.2012
9.	Total consideration	Rs.1,58,05,049/-
10.	Total amount paid by the complainant	Rs.1,44,98,122/-
11.	Date of delivery of possession Clause 21 – 3 years plus 6-month grace period from the execution of flat buyer agreement.	21.08.2015
12.	Offer of possession	03.07.2018
13.	Penalty clause (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 record available in the case file which have been provided by the complainants and the respondent. The buyer's agreement has been executed dated 21.02.2013 in respect of unit no. A049, 9th floor with respect to super area of 3400 sq. ft. for not handing over possession on due date i.e. 21.07.2015 which is an obligation of the promotor.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. Accordingly, the respondent appeared on 07.12.2018. The case came up for hearing on 07.12.2018. The reply has been filed by the respondent has been perused.



Facts of the case

6. That the complainants booked a residential flat in the project of the respondent namely “Indiabulls Enigma” at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon. Pursuant to aforesaid booking of complainants respondent vide allotment letter dated 16.02.2012 allotted a flat no. A094 on 9th floor in tower A admeasuring 3400 sq. ft. to the complainants and further induced to sign a pre-printed flat buyer agreement dated 21.02.2012.
7. The complainants submitted that they have has paid a total sum of Rs. 1,44,98,122/- towards the aforesaid residential flat in the project from 2011 to 2014 as and when demanded by the respondent. It is pertinent to state that the respondent collected more than 90% of the sale consideration by year 2014, which is also in terms with the construction linked payment plan, however still the respondent miserably failed to offer the possession of the flat in question till date despite delay of more than three years.
8. The complainants submitted that the respondent had promised to complete the project within a period of 36 months from the date of execution of the builder buyer agreement with a further grace period of six months. The flat buyer’s agreement was executed on 21.02.2011 and till date the construction is not completed.



9. The complainants submitted that respondent has failed to complete the project in time, resulting in extreme kind of mental distress, pain and agony to the complainants.
10. The complainants submitted that project Indiabulls Enigma comprises of towers A to J. The tower D is to be developed by another subsidiary of Indiabulls namely Varali Properties Ltd. The other towers i.e. A to C and E to J are being developed by respondent herein. It was presented to the complainant that towers A to D will have 17 floors. However, during the construction the respondent and varali 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 complainants submitted that 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.



12. The complainants submitted that the unlawful act of increasing the FAR, the respondent referred to an obscure notice released by the respondent in non-descript newspaper(s) advertising the said change in plan. 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. The complainants submitted that they 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 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.

14. The complainants submitted that respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. It is pertinent to mention that the respondent collected Rs. 10,71,000/- from the complainants towards the EDC/ IDC demand from February 2012 to December 2013. The said amount was collected at an excess rate of Rs. 315 per sq.mt. as against Rs. 225 sq. mtr. . 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 15.08.2018 refunded the excess amount of Rs. 3,06,000/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,06,000/- 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. The complainants submitted that respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on



21.02.2012 the project was to be completed in 3 years with grace period of six months. The respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. The project has been inordinately delayed.

16. The complainants submitted that respondent for a long time did not provide the complainants with status of the project. It is pertinent to mention that on 03.07.2018 the complainant received a letter from the respondent, wherein it is mentioned that the respondent has received occupation certificate for tower- 'A' from Director General, Town and Country Planning Department and is thereby offering possession to the complainant's subject to complainants paying the balance sale consideration. The said demand letter is totally sham as it has been issued with ulterior motives to extract money. The project is totally incomplete, and the promised amenities and facilities are missing. The alleged occupancy certificate seems to have been obtained by the respondent in collusion with authorities. The project is far from complete and the respondent has raised illegal demands. Thus, the respondent has not acted bonafidely and has suppressed the interest of the complainants and other homebuyers. Even the statement of account enclosed with the demand letter is an assortment of unreasonable and creative accounting.



17. The complainants submitted that complainants are eligible for seeking delay penalty interest@ 18% on the amount deposited by the complainants from the original date of possession till the time possession is finally handed over to the complainants complete in all aspects.

Issues to be decided:

- i. Whether the respondent has unjustifiably delayed the construction and development of the project in question?
- ii. Whether the respondent is liable to pay the delay interest @18% p.a., w.e.f 21.08.2015 along-with compensation till the time possession is handed over to the complainant?
- iii. Whether the respondent/ promoter has over charged EDC, IDC?
- iv. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
- v. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?

Relief sought:

In view of the facts mentioned above, the complainants prays for the following relief(s)

- i. Direct the respondent to award delay interest @ 18% p.a. for every month of delay, till the handing over of possession of the apartment complete in all aspect, to the complainant;



- ii. Direct the respondent to provide the schedule of construction and also to rectify the breaches with regard to extra EDC /IDC charges, VAT, service tax as well as for wrongfully inflating the super area.

Respondent's Reply

18. The respondent submitted the fact that the instant complaint is not maintainable, on facts of law, and is as such liable to be dismissed at the threshold being in wrong provisions of the law. The present complaint is devoid of any merits and had been preferred with sole motive to harass the respondent. In fact, the present complaint is liable to be dismissed on the ground that the complainants have chosen to file the instant complaint for adjudication of its grievances before the adjudicating officer under section 31 of the RERA Act, 2016. Thus, this hon'ble authority does not have any jurisdiction to entertain the same and the complaint is liable to be dismissed.
19. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact of law. The respondent denies them in toto. Nothing stated in the said complaint shall be deemed to be admitted by the respondent merely on account of non-transverse, unless the same is specifically admitted herein. 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.

20. The respondent submitted that complainants are falsifying their claim from the very fact that there has been alleged delay in delivery of possession of the booked unit however, that the complainants have filed the instant claim on the alleged delay in delivery of possession of the provisional booked unit. However, the complainants with nullified intention have not disclosed, in fact concealed the material facts from this hon'ble authority. The complainants have been willful defaulters from the beginning and not paying the installments as per the payment plan.

21. The respondent submitted that they have already completed the construction of tower A and also obtained OC for the concerned tower and already initiated the process of handing over of possession of tower A to the respective buyers. It is also submitted that they are under the process of handing over of possession of the unit of the said tower including the unit of the complainants in question.

22. The respondent submitted that as per the FBA dated 21.02.2012, executed prior to coming into force of the Real Estate (Regulation and Development) 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 the said Act and rules and no other agreement, whereas, the FBA being referred to or looked into in this proceeding is an agreement executed much before the commencement of the Act.

23. The respondent submitted that the complainants have made baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in the FBA. In view of the same, it is submitted that there is no cause of action in favor of the complainants to institute the present complaint.

Determination of issues

24. With respect to **first issue** the respondent is liable to pay interest on the delayed possession. As per clause 21 of the agreement dated 21.02.2012, the construction was to be completed within a period of 3 years with a grace period of six months from the date of execution of agreement. The due date of possession comes out to be 21.08.2015 which has already lapsed. Thus, the complainants are entitled for interest on the



delayed possession at the prescribed rate under the Act. Delay charges will accrue from the due date of possession i.e. 21.08.2015 till the offer of possession.

25. In regard to the **second issue** raised by the complainants, as the promoters has failed to fulfil their obligation under section 11, the promoters are liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. Section **18(1) is reproduced below:**

“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.



The complainants reserves their right to seek compensation from the promoters for which they shall make separate application to the adjudicating officer, if required

26. With respect to the **third issue**, as per clause 6(vii) of the buyer's agreement, the respondent can change revised EDC/IDC charges with retrospective effect as imposed by the central or state government or any other authority. So, EDC/IDC are charged as per the term of the agreement
27. With respect to **the fourth and fifth issue** these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainants have only dealt these issues in the facts of the complaint and no documents have been annexed in respect of the same, thus issues cannot be determined.



Findings of the authority

28. The authority has complete subject matter 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 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.

Decision and directions of the authority

29. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority is of the view that builder has offered the possession on 03.07.2018 and complainant has not resolved the matter with respect to the payment of delayed possession charges at the prescribed rate i.e. @ 10.75% per annum as per the proviso of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The respondent has rather given him a ledger of account vide which he has adjusted only delayed possession charges in terms of clause 22 of BBA at Rs. 5/- per sq. ft. per month of the super area which is not reasonable and in accordance with law.

30. The builder as well as buyer shall be equitable in charging interest @ 10.75% p. a. on both sides i.e. default of buyer to make payment and delayed possession charges. Respondent



has stated that he had already received occupation certificate on 06.04.2018 and he had sent possession letter to the buyer on 03.07.2018.

31. As per clause 21 of the flat buyer agreement dated 21.02.2012 for unit no. A094, 9th floor, Block-A, in Indiabulls Enigma, Sector-110, Gurugram possession was to be handed over to the complainant within a period of 36 month's + 6 month's grace period which comes out to be 21.08.2015. However, the respondent has not delivered the unit in time. Complainants have already deposited Rs.1,44,98,122/- with the respondent. As such, complainants are entitled for delayed possession charges @ 10.75% per annum amounting to Rs. 44,67,126/- w.e.f 21.08.2015 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.
32. Thereafter the respondent shall pay monthly interest amounting Rs. 1,29,879/- to be paid by 10th of every subsequent month on paid amount of the complainant.
33. Hence the authority exercising its under section 37 of the act hereby directs the respondent to act in accordance with the provisions of section 18 (1) of the Act ibid i.e. to adjust the amount @ 10.75% per annum i.e. delayed possession charges. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.
34. The complaint is disposed of accordingly.



35. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 07.12.2018

Judgement Uploaded on 08.01.2019



HARERA
GURUGRAM

