

PROCEEDINGS OF THE DAY

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| Day and Date | Friday and 07.12.2018 |
| Complaint No. | 558/2018 Case Titled As Mr. Vijay Shamsher Rai & Anr V/S M/S Athena Infrastructure Ltd. |
| Complainant | Mr. Vijay Shamsher Rai & 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 | 18.9.2018 |
| 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 **25.4.2018** 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.

As per clause 21 of the Flat Buyer Agreement dated 27.7.2011 for unit No.A142, 14th floor, Tower-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 **27.1.2015**. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,77,73,467/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f 27.1.2015 till the date of offer of possession. **i.e. 25.4.2018** 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. After adjustment of already adjusted amount, the balance interest amount accrued so far at the rate of 10.75% 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)
7.12.2018

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

Complaint no. : 558 of 2018
First date of hearing: 08.09.2018
Date of decision : 07.12.2018

Mr. Vijay Shamsheer Rai
R/o A-414, 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 Vaibhav Suri
Shri 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 & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Vijay Shamsheer Rai, 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 flat buyer agreement dated 27.07.2011 in respect of



unit no. A142, 14th floor with respect to super area of 3400 sq. ft. for not handing over possession on due date i.e. 27.01.2015 which is an obligation under section 11(4)(a) of Act ibid.

2. Since, the flat buyer's agreement has been executed on 27.07.2011 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: -

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| 1. | Name and location of the project | India bulls enigma, sector 110, Gurugram |
| 2. | Nature of the project | Residential complex |
| 3. | RERA registered/ not registered. | Registered (351 of 2017) |
| 4. | Revised date of completion as per registration certificate | 31.08.2018 (expired however respondent has applied for extension wherein the revised date for delivery of possession is mentioned as March ,2019) |
| 5. | Apartment/unit no. | A142,14 th floor, tower A |
| 6. | Apartment measuring | 3400 sq. ft. |



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| 7. | Payment plan | Construction linked payment plan |
| 8. | Date of execution of buyer's agreement | 27.07.2011 |
| 9. | Total consideration | Rs.1,71,13,200/- |
| 10. | Total amount paid by the complainant | Rs.1,77,73,467/- |
| 11. | Date of delivery of possession Clause 21 – 3 years plus 6-month grace period from the execution of flat buyer agreement. | 27.01.2015 |
| 12. | Delay in handing over the possession | 3 years 11 months |
| 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 complainant and the respondent. As per flat buyer agreement dated 27.07.2011 possession of the flat no. A142 was to be delivered on 27.01.2015. However, respondent has failed to fulfil its obligation till date.

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 18.09.2018 and 07.12.2018. The reply has been filed by the respondent has been perused.



Facts of the case

6. The complainant submitted that he booked a residential flat in the project of the respondent namely “Indiabulls Enigma” at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon.
7. The complainant submitted that he was induced to sign a pre-printed flat buyer agreement dated 27.07.2011 and vide aforesaid FBA the respondent allotted flat bearing no. A-142 on 14th floor in tower no. A, admeasuring super area of 3400 sq. ft. to the complainants.
8. The complainant submitted that he has paid a total sum of Rs. 1,77,73,467/- 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 95% 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.



9. The complainants submitted that 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 27.07.2011 and till date the construction is not complete.

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 complainant 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 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 respondent did not seek the consent of the complainants 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 advertisement material displayed at site as well as on the internet.
13. 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 have 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. The complainants submitted that they 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 complainants submitted that 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 finally on 05.08.2016 adjusted the excess amount of Rs. 3,06,000/-. The respondent did not pay any interest to the complainant 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.

16. The complainant submitted that respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 27.07.2011 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.

Issues to be decided:

- 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 has unjustifiably delayed the construction and development of the project in question?**
- 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(s) sought:

In view of the facts mentioned above, the complainant 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 respect, 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

17. 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 complainant has 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 have any jurisdiction to entertain the same and the complaint is liable to be dismissed.

18. The respondent submitted that the present complaint is not maintainable before the hon'ble authority and also devoid of any merits, which has been preferred with sole motive to harass the respondent. In fact, the complainant is guilty and has concealed the true facts about approaching the National Consumer Dispute Redressal Commission for the baseless grievances against the respondent and thus try to mislead the hon'ble authority.

19. The respondent contended the instant complaint filed by the complainant before the hon'ble authority is liable to be dismissed in view of section 71(1) RERA Act 2016, which



specifically states that any complainant who has already filed a complaint before the consumer forum and is pending , in such eventuality such customer will have to withdraw his complaint with the permission from the consumer forum to file an application before the adjudicating officer for the adjudication of his dispute as per act.

20. 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.

21. The respondent submitted that as per the FBA dated 27.07.2011, executed prior to coming into force of the Real Estate (Regulation and Development) Act, 2016. The complainant is falsifying his claim from the very fact that there has been alleged delay in delivery of possession of the booked



unit however, the complainant with nullified intention have not disclosed, in fact concealed the material facts from this hon'ble authority. The complainant has been willful defaulter from the beginning and not paying the installments as per the payment plan.

22. 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 complainant in question.

23. The respondent submitted that as per the FBA dated 27.07.2011, 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.

24. The respondent submitted that the complainant has 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 complainant to institute the present complaint.

Determination of issue

25. With respect to **first issue** the complainant has failed to produce any evidence in support of their allegation that promoter has made false representation about the project in question in order to induce the complainant to make a booking.
26. With respect to **second issue** the respondent is liable to pay interest on the delayed possession. This is fortified from the fact that as per clause 21 of the agreement dated 27.07.2011, 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 27.01.2015 which has already lapsed. However, the possession has not been delivered by the respondent till date which is in violation of section 11(4)(a). Thus, the complainant is entitled for interest on the delayed possession at the prescribed rate in terms of provision of as section 18(1) of the act the Act. Delay charges will accrue from the due date of possession i.e. 27.01.2015 till the offer of possession.

27. 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

28. With respect to **fourth and fifth** these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainant has made only mere averments to these issues in the facts of the complaint and no



documents have been annexed in respect of the same, thus issues cannot be determined.

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

Findings of the authority

30. 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

31. Keeping in view the facts and circumstances of the complaint, the authority is of the view that as per clause 21 of the Flat Buyer Agreement dated 27.7.2011 for unit no. A142, 14th floor, Tower-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 27.01.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1, 77, 73,467/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum amounting to Rs. 62,03,061.72/- w.e.f 27.1.2015 till the date of offer of possession. i.e. 25.04.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

32. The authority u/s 37 issues the following directions:

- a. 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.
- b. Thereafter the respondent shall pay monthly interest amounting Rs. 15,99,220.66/- to be paid by 10th of



every subsequent month on paid amount of the complainant.

- c. After adjustment of already adjusted amount, the balance interest amount accrued so far at the rate of 10.75% shall be paid amounting Rs. 62,03,061.72/-to the complainant within 90 days from the date of this order.

33. The complaint is disposed of accordingly.

34. 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

