

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 13.12.2018
Complaint No.	608/2018 Case titled as Mr. Joginder Mittal, V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Joginder Mittal
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

Project is registered with the authority.

Arguments heard.

At the time of arguments, the respondent apprised that they had already received occupation certificate on 6.4.2018 and he had sent possession letter to the buyer on 3.7.2018, whereas the counsel for the complainant has stated that complainant has received a copy of offer of possession on 27.11.2018 (copy of the said letter has been placed on record).

As per clause 21 of the Flat Buyer Agreement dated 5.12.2012, for unit No.A 073, 7th floor, Block-A 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 5.6.2016. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,90,98,118/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f 5.6.2016 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 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)
13.12.2018

Subhash Chander Kush
(Member)
13.12.2018

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

Complaint no. : 608 of 2018
First date of hearing: 25.09.2018
Date of decision : 13.12.2018

Mr. Joginder Mittal
R/o H.no. 23, Floor 2, Navjeevan Vihar,
Malviya Nagar , South Delhi, Delhi – 110017

Complainant

Versus

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

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vijender Parmar Advocate for complainant
Shri Rahul Yadav Advocate for the respondent

ORDER

1. A complaint dated 25.07.2018 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. Joginder Mittal, 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 05.12.2012 in respect of unit no. A073, 9th floor with respect to super area of 3400 sq. ft. for not handing over possession on due date i.e. 05.06.2016 which is an obligation under section 11(4)(a) of act ibid.

2. Since, the buyer's agreement has been executed on 05.12.2012 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, sector 110, Gurugram
2.	Nature of the project	Residential
3.	RERA registered/ not registered.	351 of 2017
4.	Revised date of completion as per registration certificate	31.08.2018(expired but respondent has applied for extension wherein the revised date for delivery of possession is March,



		2019)
5.	Apartment/unit no.	A073,7 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	05.12.2012
9.	Total consideration	Rs.1,93,12,998/-
10.	Total amount paid by the complainant	Rs.1,90,98,118/-
11.	Date of delivery of possession Clause 21 – 3 years plus 6-month grace period from the execution of flat buyer agreement.	05.06.2016
12.	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. A buyer's agreement has been executed dated 05.12.2012 in respect of unit no. A073, 7th floor block A with respect to super area of 3400 sq. ft. for not handing over possession on due date i.e. 05.06.2017 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 13.12.2018. The case came up for hearing on 25.09.2018 and 13.12.2018. The



reply has been filed by the respondent which has been perused.

Facts of the case

6. The complainants submitted that he has booked a residential flat bearing No. A-073 on 7th floor in tower-A in the proposed project of the respondent measuring approximately super area of 3400 sq. ft. (315.87 Sq. meter) and covered area of 2605.54 sq. ft. (242.07 Sq. meter) in the township to be developed by respondent. It was assured and represented to the complainant by the respondent that it had already taken the required necessary approvals and sanctions from the concerned authorities and departments to develop and complete the proposed project on the time as assured by the respondent. Accordingly, the complainant had paid Rs.5,00,000/- through cheque bearing no.601472 dated 01.10.2010 and the same was received by the respondent and receipt was issued by the respondent on 01.10.2010 as booking amount.

7. The complainants submitted that respondent assured the complainant that it would issue the allotment letter at the



earliest and maximum within one week, the complainant will get the builder buyer agreement as a confirmation of the allotment of said residential flat in his name. However, the respondent did not fulfill its promise and assurance and has issued only the application form, despite repeated requests and reminders of the complainant to issue the allotment letter and flat buyer's agreement.

8. The complainants submitted that in the said application form, the price of the said flat was agreed at the rate of Rs. 5,000/- 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.

9. The complainants submitted that thereafter, the respondent started raising the demand of money /installments 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 acting arbitrarily and negligently has refused and ignored the requests and demands of the complainant on lame excuses and deliberately and intentionally delayed the execution of the flat buyer's agreement for more than one year and ultimately it was executed on 05.12.2012.

10. The complainants submitted that at the time of execution of the said agreement, the respondent misusing its dominant position had coerced and pressurized the complainant to sign the arbitrary, illegal and unilateral terms of the said flat buyer agreement and when the complainant had 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 and to



found himself helpless and being cheated had under duress and coercion had signed 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. 5,000/- per sq. ft. to Rs. 5,176.47/- 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 complainants submitted that as per the clause -21 of the said flat buyer's agreement dated 05.12.2012, the respondent has agreed and promise to complete the construction of the said flat and deliver its possession within a period of 3 year with a six (6) months grace period thereon from the date of execution of the said flat buyer's agreement.
12. The complainants submitted that from the date of booking and till today, the respondent had raised various demands for the payment of installments on complainant towards the sale consideration of said flat and the complainant has duly paid and satisfied all those demands as per the flat buyers



agreement without any default or delay on his part and has also fulfilled otherwise also his part of obligations as agreed in the flat buyers agreement. The complainant was and has always been ready and willing to fulfill his part of agreement, if any pending.

13. The complainant had solely paid the entire sale consideration to the respondent for the said flat. As per the statement dated 03.07.2018, issued by the respondent, upon the request of the complainant, the complainant has already paid Rs.1,90,98,118/- towards total sale consideration as on today to the respondent as demanded from time to time and now nothing major is pending to be paid on the part of complainant.

14. The complainants submitted that the respondent has issued receipts from the date of booking in the name of the complainant towards the payments made by him to the respondent towards sale consideration for the said flat.

15. The complainants submitted that on the date agreed for the delivery of possession of said unit as per date of booking and



later on according to the flat buyers agreement, the complainant had approached the respondent and its officers inquiring the status of delivery of possession, but none had bothered to provide any satisfactory answer or reply or response to the complainant about the completion and delivery said flat. The complainant thereafter kept running from pillar to post asking for the delivery of his home but could not succeed as the construction of the said flat and said project was nowhere near to completion and still has not been completed.

16. The complainant thereafter had tried his level best to reach the representatives of the respondent to seek a satisfactory reply in respect of the said flat but all in vain. The complainant had also informed the respondent about his financial hardship of paying monthly rent of Rs. 40,000/- due to delay in getting possession of the said flat. The complainant had requested the respondent to deliver his flat citing the extreme financial and mental pressure he was going through, but the respondent never cared to listen to his



grievances and left him with the suffering and pain on account of its default and negligence.

17. The complainants submitted that the respondent had made all those false, fake, wrongful and fraudulent promises just to induce the complainant to buy the said flat basis its false and frivolous promises, which the respondent never intended to fulfill. The respondent in its advertisements had represented falsely regarding the area, price, quality and the delivery date of possession and resorted to all kind of unfair trade practices while transacting with the complainant.

18. The complainants submitted that relying upon respondent's representation and believing them to be true, the complainant was induced to pay Rs.1,90,98,118/- as sale consideration of the aforesaid flat as on today.

19. The complainants submitted that due to the failure on the part of the respondent to deliver the said flat on time as agreed in the builder buyer 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. The complainant was constrained to pay the aforesaid rental amount solely due to the deficiency in services and negligence on the part of the respondent in delivering said unit within the timelines as agreed in the flat buyer's agreement. The complainant has suffered this monetary loss just because of the unfair trade practices adopted by the respondent in their business practices with respect to the said flat.

20. The complainants submitted that the respondent is guilty of deficiency in service, unfair trade practice, giving incorrect and false statement while selling the said flat to the complainant within the purview of provisions of The Real Estate (Regulation & Development) Act, 2016 and applicable rules. The complainant has suffered losses on account deficiency in service, unfair trade practice, giving incorrect and false statement. As such the respondent is fully liable to pay /reimburse the payment claimed by the complainant by



returning his entire investment along-with the applicable interest along-with the compensation and damages for the losses incurred by the complainant due to the wrongful and fraudulent acts of the respondent.

21. The complainants submitted that the cause of action accrued in favor of the complainant and against the respondent on 01.10.2010, when the complainant had booked the said flat and it further arose when respondent failed /neglected to deliver the said flat. The cause of action is continuing and is still subsisting on day-to-day basis.
22. The complainants submitted that the complainant further declares that the matter regarding which this complaint has been made is not pending before any court of law and any other authority or any other tribunal on the subject matter



Issues to be decided:

- 1. Whether the terms of flat buyer's agreement are one sided and unilateral?**
- 2. Whether the respondent has unjustifiably delayed the construction and development of the project in question?**

3. Whether the respondent is liable to pay the delay interest @18% p.a., w.e.f 05.06.2016 along-with compensation till the time possession is handed over to the complainant?
4. Whether the complainant is entitled for refund of sales consideration amounting to Rs. 1, 90,98,118/-?
5. Whether the respondent is liable to be prosecuted for contravening section 12 of the Act for giving incorrect and false statement while selling the said flat to the complainant?

Relief(s) sought:

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

- a) Direct the respondent to award delay interest @ 18% p.a. for every month of delay and refund of amount Rs. 1,90,98,118/-

Respondent's Reply

23. 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 71 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.

24. 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.

25. The 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.

26. 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.

27. The respondent submitted that as per the FBA dated 05.02.2012, 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.

28. 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

29. With respect to **first issue** raised by the complainant the complainant has failed to adduce / specify patently as to which terms of agreement are one sided and unilateral.
30. 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 05.12.2012, the construction was to be completed within a period of 3 years with a grace period of six months. The due date of possession comes out to be 05.06.2016 which has already lapsed. However, the respondent has failed to fulfill its contractual obligation till date. Thus, the complainant is entitled for interest on the delayed possession at the prescribed rate in terms of section 18(1) the Act. Delay



charges will accrue from the due date of possession i.e. 05.06.2016 till the offer of possession.

31. In regard to the **third issue** raised by the complainant, as the promoters has failed to fulfil her obligation under section 11, the promoters are liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.
32. The complainant reserves his right to seek compensation from the promoters for which he shall make separate application to the adjudicating officer, if required.
33. With respect to **fourth issue** raised by the complainant, it has been observed by the authority at the time of arguments that the respondent has received occupation certificate on 06.04.2018 and sent possession letter to the complainant on 03.07.2018 which was received by the complainant on 27.11.2018. Hence, keeping in view the status of the project it is wrong to direct refund for paid amount as it will hamper the interest of other allottees who wish to continue with the project.



34. With respect to **fifth issue** raised by the respondent the flat buyer's agreement was executed on 05.12.2012 i.e. prior to the commencement of the Act and provisions of section 12 of the Act does not apply retro respectively.

Findings of the authority

35. 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 & 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

36. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments the respondent apprised that they had already received occupation certificate on 6.4.2018 and they had sent possession letter to the buyer on 03.07.2018, whereas the counsel for the complainant has stated that complainant has received a copy of offer of possession on 27.11.2018 (copy of the said letter has been placed on record).

37. As per clause 21 of the flat buyer agreement dated 05.12.2012, for unit no. A 073, 7th floor, Block-A 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 05.06.2016. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,90,98,118/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum amounting to Rs. 42,63,589.44/- w.e.f the due date of delivery of possession i.e. 05.06.2016 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 & Development) Act, 2016.

38. Thereafter the respondent shall pay monthly interest amounting Rs. 1,71,087.31/- on 10th of subsequent month.

39. 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. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

40. The complaint is disposed of accordingly. The file is consigned to the registry.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 13.12.2018

Judgement Uploaded on 08.01.2019