

PROCEEDINGS OF THE DAY

Day and Date	Friday and 14.12.2018
Complaint No.	658/2018 Case titled as Mr. Vijay Kumar Gupta & Anr V/S M/S Varali Properties Ltd.
Complainant	Mr. Vijay Kumar Gupta & Anr
Represented through	Complainant No.1 in person with Shri Vaibhav Suri, Advocate.
Respondent	M/S Varali Properties Ltd.
Respondent Represented through	Shri Rahul Yadav Advocate for the respondent.
Last date of hearing	27.9.2018
Proceeding Recorded by	Naresh Kumari & H.R.Mehta

Proceedings

Arguments heard.

Project is registered with the authority. Occupation certificate has already been received by the respondent on 17.9.2018.

As per clause 21 of the Builder Buyer Agreement dated 6.2.2013 for unit No.D144, 14th floor, Tower-D 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 **6.8.2016**. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.2,31,17,049 /- to the respondent.

Counsel for the respondent has stated at bar that they have received occupation certificate on 17.9.2018 and they shall be issuing offer of

possession within 15 days from today. However, respondent will also ascertain the calculation sheet as per the provisions of the RERA Act and not on the basis of previous agreement clauses which give only paltry sum as compensation. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **6.8.2016** 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)
14.12.2018

Subhash Chander Kush
(Member)
14.12.2018

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

Complaint no. : 658 of 2018
First date of hearing: 27.09.2018
Date of decision : 14.12.2018

1. Mr. Vijay Kumar Gupta
2. Mrs. Sushma Gupta
C-504, Central Park- 1, Sector 42, Gurugram - **Complainant**
122009

Versus

Varali Properties Ltd
M-62 & 63, first Floor, Connaught Place,
New Delhi - 11001 **Respondent**

CORAM:

Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

APPEARANCE:

Shri Vaibhav Suri with Advocate for complainant
complainant no.1 in person
Shri Rahul Yadav Advocate for the respondent

ORDER

1. A complaint dated 02.08.2018 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 Mr. Vijay Kumar Gupta and Mrs. Sushma Gupta against the promoter M/s Varali Properties Ltd., on account of violation of the clause 21 of the flat buyer agreement executed on 06.02.2013 in



respect of unit no D144, 14th floor, block/tower D in the project 'Indiabulls Enigma', Sector 110, Gurugram with a super area of 3400sq. ft. for not handing over possession on the due date i.e. 06.08.2016 which is an obligation under section 11(4)(a) of the Act *ibid*.

2. Since, the flat buyer's agreement has been executed on 06.02.2013 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
2.	Nature of project	Residential complex
3.	Flat no.	D144, 14 th floor, tower D
4.	Flat measuring	3400 sq. Ft.
5.	RERA registered/ not registered.	Registered (351 of 2017)
6.	Revised date of completion as per registration certificate	31.08.2018 (Applied for extension)
7.	Date of execution of flat buyer's agreement	06.02.2013
8.	Payment plan	Construction linked plan
9.	Total amount paid by the complainant till date	2,31,17,049/-
10.	Total consideration amount	2,37,19,400/-



11.	Date of delivery of possession as per clause 21 of buyer's agreement (3 year + 6 months grace period from the date of agreement)	06.08.2016
12.	Delay in handing over possession till date	2 years 4 months
13.	Penalty clause	Clause 22 Rs. 5/- per sq. ft. per month of 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. An flat buyer's agreement dated 06.02.2013 is available on record for the aforesaid unit no. D144 tower D 14th floor , according to which the possession of the same was to be delivered by 06.08.2016. However, the respondent has failed to deliver the possession till date. Therefore, the promoter has not fulfilled his committed liability till date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. Accordingly, the respondent appeared on 14.12.2018. The case came up for hearing on 27.09.2018 and 14.12.2018. The reply has been filed by the respondent on 18.08.2018



Facts of the complaint

6. The complainants stated that they jointly booked a flat with the respondent in the project in question, subsequent to which the complainants were induced to sign a pre-printed flat buyer agreement dated 06.02.2013 and vide aforesaid FBA the respondent allotted flat bearing no. D-144 on 14th floor in tower no. B, admeasuring super area of 3400sq.ft. to the complainants.
7. The complainants submitted that they have paid a total sum of Rs. 2,31,17,049/- towards the aforesaid residential flat in the project from November 2012 to August 2014 as and when demanded by the respondent. It is pertinent to mention that the complainants had opted for a special payment plan wherein more than 50% of the total sale consideration was supposed to be paid before construction of basement slab. Accordingly, the complainants had made more 80% payments to the respondents by March 2013.
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 flat buyer agreement with a further grace period of six months. The flat buyer's agreement was executed on 06.02.2013 and till date the construction is not complete. Furthermore, the respondent had accepted more than 80% of the sale consideration within three months



of the booking and as such the gross delay in completion of the project is solely attributable to the respondent.

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 the project Indiabulls Enigma comprises of towers A to J. The tower D is to be developed by the respondent herein. The other towers i.e. A to C and E to J are being developed by another subsidiary of Indiabulls namely Athena Infrastructure Limited. It was presented to the complainants that towers A to D will have 17 floors. However, during the construction the respondent and Athena 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 alleged 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 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 illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. It is pertinent to mention that 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 05.08.2018 refunded the excess amount of Rs. 3,44,250/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,44,250/- 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 06.02.2013 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. Hence, the complainant left with no other option and have filed the instant complainant before the authority.



Issues raised by the complainants are as follow:

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

Relief sought:

The complainants are seeking the following relief:



- i. Direct the respondent to pay refund of the entire amount along-with interest as deposited by the complainants towards the sale consideration of the booked unit or in alternative 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, wrongfully charging of parking charges, VAT, service tax, PLC as well as for wrongfully inflating the super area.**

Respondent's reply

17. The respondent submitted that the instant complaint filed by the complainants is not maintainable, on facts or in law and is as such liable to be dismissed at the thresh hold, being filed within the provisions which are outside the preview of the hon'ble authority. Hence the instant complaint of the complainants is liable to be dismissed on the same ground.
18. The respondent submitted that the complaint filed by the complainants before the hon'ble authority is liable to be dismissed in view of section 71(1) RERA ACT 2016, which specifically states that any consumer/ complainant who has



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

19. The respondent submitted that the relationship between the complainant and respondent is governed by the document executed between them i.e. FBA dated 27.07.2011. It is pertinent to mention herein that the instant complaint of the complainants is further falsifying their claim from the very fact that , the complainants have filed the instant claim on alleged delay in delivering of possession of the provisionally booked unit however the complainants with malafide intention has not disclosed, in fact concealed the material fact from this hon'ble authority that the complainants have been a willful defaulter since the beginning, not paying their installments on time as per the construction linked plan opted by them.

20. The respondent has submitted that they have already completed the construction of tower A and has also already obtained occupation certificate for the said tower and have already initiated the procedure of handing over possession of the units of tower A to its respective buyers. Thus, the delay



caused in handing over of possession was due to the factors beyond the control of the respondent.

21. The respondent submitted that no proper connectivity has been provided to the project of the respondent by the Haryana government. It will also not be out of place to mention that the respondent has been diligently pursuing the matter with various authorities and hence no delay can be attributed on the part of respondent.
22. The respondent submitted that the agreement that has been referred to for the purpose of adjudication which is the flat buyers' agreement dated 27.07.2011 had been executed prior to the coming into force of RERA Act and rules, 2017. The only agreement which can be relied upon in this complaint is the agreement to sell and not flat buyers' agreement which has been executed prior into coming into force of HARERA rules.
23. The respondent submitted that the delay caused in delivery of possession was due to the depression caused in the market and even then 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.

24. That the complainants have made false and baseless allegation with a mischievous intention to retract from the agreed terms and condition duly agreed in FBA entered into between the parties.

Determination of issues

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 06.02.2013, 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 06.08.2016 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 as per section 18(1) of the



Act. Delay charges will accrue from the due date of possession i.e. 06.08.2016 till the offer of possession.

27. In regard to the **third issue** raised by the complainant, as the promoters has failed to fulfil their obligation under section 11, the promoter is 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. The complainants reserve their right to seek compensation from the promoters for which he shall make separate application to the adjudicating officer, if required
28. With respect to the **fourth 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
29. With respect to **fifth and sixth** issue raised by the complainant, these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainant has 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.



30. 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

31. 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

32. Keeping in view the facts and circumstances of the complaint the project is registered with the authority. Occupation certificate has already been received by the respondent on 17.09.2018.

33. As per clause 21 of the builder buyer agreement dated 6.2.2013 for unit no. D144, 14th floor, tower-D in project "Indiabulls Enigma, in Sector-110, Gurugram, possession was to be handed over to the complainants within a period of 3 years + 6 months grace period which comes out to be 06.08.2016. However, the respondent has not delivered the unit in time. Complainants have already paid Rs.2,31,17,049 /- to the respondent.

34. During the course of arguments counsel for the respondent has stated at bar that they have received occupation certificate on 17.9.2018 and they shall be issuing offer of possession i.e. by 29.12.2018. However, respondent will also ascertain the calculation sheet as per the provisions of the RERA Act and not on the basis of previous agreement clauses which give only partly sum as compensation. As such, complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum amounting Rs. 58,55,263.51/- w.e.f. 06.08.2016 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 failing which the complainants are entitled to refund the amount.

35. 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 amounting to Rs. 58,55,263.51/- from due date of delivery of possession till 14.12.2018 accrued so far shall be paid to the complainant within 90 days from the date of this order.

36. Thereafter, the respondent shall pay monthly interest @ 10.75% monthly amounting to Rs. 2,07,090.23/- be payable to the complainant on 10th of subsequent month.
37. The complaint is disposed of accordingly. The file is consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 14.12.2018

Judgement Uploaded on 08.01.2019

