

PROCEEDINGS OF THE DAY

Day and Date	Friday and 07.12.2018
Complaint No.	550/2018 Case titled as Mr. Mahendra Prasad Sharma V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Mahendra Prasad Sharma
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.

As per clause 21 of the Builder Buyer Agreement dated 10.10.2011 for unit No.C051, Tower C, 5th floor 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 **10.4.2015**. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,60,85,443/- to the respondent.

Project was registered but the date of completion of project has elapsed on 31.8.2018 as per registration certificate. Counsel for the

respondent stated that they have applied for extension of registration and the revised date of delivery of possession is March 2019. Project is badly delayed

Complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **10.4.2015** 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. : 550 of 2018
First date of hearing : 13.09.2018
Date of decision : 07.12.2018

Mr. Mahendra Prasad Sharma
Mrs Kalpana Sharma
R/o B-201, Garden Estate Apartments, Plot 5B,
Sector 22, Dwarka, New Delhi-110077

Complainants

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:

Mr Vaibhav Suri
Shri Rahul Yadav

Advocate for the complainants
Advocate for the respondent

ORDER

1. A complaint dated 10.07.2018 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 complainants Mr. Mahendra Prasad Sharma and Mrs Kalpana Sharma against the promoter M/s Athena Infrastructure Ltd. in respect of unit no. C-051, 5th



floor, Tower C with a super area of 3350 sq. ft in the project 'India Bulls Enigma', sector 110, Gurugram on account of violation of clause 21 of the flat buyer agreement dated 10.10.2011 for not handing over possession on due date i.e. 10.04.2015 which is an obligation under section 11(4)(a) of act *ibid*.

2. Since, the flat buyer agreement was executed on 10.10.2011 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: -

1.	Name and location of the project	Indiabulls Enigma at Sector 110, Gurgaon
2.	Nature of the project	Residential complex
3.	Current status of project	Construction of Tower C completed (As per para 8 on page 5 of



		reply filled by respondent)
4.	Project area	15.6 acres
5.	DTCP license	213 of 2007 10 of 2011 64 of 2012
6.	RERA registered/ not registered.	Registered (Phase 1)
7.	RERA registration no	351 of 2017
8.	Completion date as per RERA certificate	31.08.2018 (expired but respondent has applied for extension wherein date of revised date of delivery mentioned is March 2019)
9.	Apartment/unit no.	C-051, 5 th floor, Tower C
10.	Apartment measuring	3350 sq. ft super area
11.	Payment plan	Construction linked payment plan
12.	Date of execution of flat buyer agreement	10.10.2011
13.	Total consideration	Rs 1,71,85,011/- (As per payment schedule page no 70)
14.	Total amount paid by the complainant till date	Rs 1,60,85,443/- (As per statement of accounts dated 02.07.2018)
15.	Date of delivery of possession (As per clause 21 – 3 years plus 6 months grace period from the	10.04.2015



	execution of flat buyer agreement)	
16.	Penalty clause (As per clause 22 of flat buyer agreement)	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 flat buyer agreement dated 10.10.2011 is available on record.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 13.09.2018. The case came up for hearing on 13.09.2018 and 07.12.2018. The reply filed on behalf of 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 the representatives of Indiabulls Real Estate Ltd. represented to the complainant that Indiabulls is developing the above project through its



100% subsidiary Athena Infrastructure Ltd. The complainant was induced to book the above flat by showing brochures and advertisements material depicting that the project will be developed as a state-of-art Project and shall be one of its kind. It was stated that the Indiabulls Enigma is a premium high-end multi-storey project being developed with the assistance of internationally renowned architects. It was also represented that all necessary sanctions and approvals had been obtained to complete the same within the promised time frame.

8. That the complainant was induced by the assurances and promises made by the respondent/ promoter and accordingly the complainant booked a flat with the respondent in the project in question, subsequent to which the complainant was induced to sign a pre-printed flat buyer agreement dated 10.10.2011 and vide aforesaid FBA the respondent allotted flat bearing No. C-051 on 5th floor in Tower No. C, admeasuring super area of 3350sq.ft. to the complainant.

9. That the complainant have paid a total sum of Rs. 1,60,85,443/- towards the aforesaid residential flat in the project from April 2011 to September 2015 as and when



demanded by the respondent. It is pertinent to state that the respondent collected more than 90% of the sale consideration by April 2011 till in end of year 2013, which is also in terms with the construction linked payment plan, however despite collecting 95% payment, the respondent/ promoter miserably failed to offer the possession of the flat in question till date.

10. 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 agreement was executed on 26.06.2011 and however the construction has not been completed till date.
11. That the respondent has failed to complete the project in time, resulting in extreme kind of mental distress, pain and agony to the complainants.
12. That the 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.

13. The 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.

14. The 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's advertisement material displayed at site as well as on the internet.

15. 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.



16. The complainants 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.

17. The respondent has sold the project stating that it will be next landmark in luxury housing and will redefine the meaning of luxury but the respondent has converted the project into a concrete jungle. There are no visible signs of alleged luxuries.



18. That the 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 respondent/ promoter collected Rs. 10,55,250/- from the complainants towards the EDC/ IDC demand from July, 2011- September, 2013. The said amount was collected at an excess rate of Rs. 315/- per sq.mt. as against Rs. 190/- sq. m. 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 15.08.2016 refunded the excess amount of Rs. 3,01,500/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,01,500/- 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.

19. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 10.10.2011 the project was to



be completed in 3 years with grace period of six months. It is pertinent to mention that the complainants had signed the application form on 16.03.2011 which was accepted on same date and in the month of March itself the complainant had signed the flat buyer agreement; however the respondent mentioned 10.10.2011 as the date of execution on the FBA. 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.

20. The respondent has not provided the details of the status of the project. The complainants are entitled for interest @ 18% p.a. for every month of delay till the possession of the apartment is handed over to the complainants, complete in all respects.

Issues raised by the complainants

21. The issues raised by the complainant are as follows :
- Whether the respondent has 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 10.04.2015 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 and PLC?

Reliefs sought

22. The reliefs sought by the complainant are as follows :-

- i. Direct the respondent to pay refund 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.
- iii. Direct the respondent to pay a sum of Rs. 50 lacs to the complainant as compensation for making misrepresentations and giving false and incorrect statement at the time of booking;
- iv. Direct the respondents to pay a sum of Rs. 50,000/- to the complainant towards the cost of the litigation.

Respondent's Reply

23. 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. In fact 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 authority. That the instant complaint filed by the complainants before the authority is liable to be dismissed in view of Section 71 (1) of RERA Act 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 complainants 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.

24. 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*. 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 *in limini*.



25. The respondent submitted that the complainant has preferred to file their complaint before the authority for adjudication of their complaint, however the same is ought to be filled before adjudicating officer as per Section 71 (1) of the RERA Act, 2016. Hence it is respectfully submitted that, the instant complaint be referred to the adjudicating officer and this authority may dismiss the same forthwith.

26. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. FBA dated 10.10.2011. 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 the alleged delay in delivery of possession of the provisionally booked unit however the complainants with malafide intention have not disclosed, infact concealed the material fact from this authority that the complainants have been a wilful defaulter since the beginning, not paying their instalments on time as per the construction link plan opted by them. It is stated that the complainants have not come before this



authority with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainants in the present complaint.

27. The respondent submitted that it is pertinent to mention here that from the very beginning it was in the knowledge of the complainants, that there is a mechanism detailed in the FBA which covers the exigencies of inordinate delay caused in completion and handing over of the booked Unit i.e. enumerated in the "Clause 22" of duly executed FBA, which is at of the FBA dated 10.10.2011 filed by the complainants.
28. The respondent submitted that the complainant only after being satisfied with the project in totality that the complainant expressed his willingness to book a unit in the project looking into the financial viability of the project and its future monetary benefits got the said unit booked with the respondent.
29. The respondent also submitted that he has already completed the construction of the "tower C" and will be applying for grant



of occupational certificate in short span of time for the said tower.

30. The respondent submitted that the delay in delivering the possession of the flat to the complainants were 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 problems related to labour/ raw material and government restrictions including National Green Tribunal which imposed a ban on carrying out constructions in Delhi-NCR for several months, the respondent kept on the work moving steadily. That based upon the past experiences the Respondent has specifically mentioned all the above contingencies in the FBA dated 10.10.2011 and incorporated them in "Clause 39" of FBA with the complaint by the complainants.

31. In addition to the reasons as detailed above, there was a delay in sanctioning of the permissions and sanctions from the departments, in fact as of now 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 the respondent.

32. It is pertinent to mention herein that the agreement for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 10.10.2011 was executed much prior to coming into force of the RERA Act, 2016 and the HA-RERA Rules, 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under RERA ACT, 2016 has to be in reference to the Agreement for Sale executed in terms of said Act and said Rules and no other agreement, whereas, the FBA being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainants on the basis of the new agreement to sell as per RERA, Act 2016.



33. The respondent also 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 developer 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 "Indiabulls Enigma" has never been stopped or abandoned and has now reached its pinnacle.



Determination of issues

34. With respect to **issue no. 1 and 2**, the authority is of the view that the respondent has delayed the delivery of possession of

the booked unit. This is fortified from the fact that as per clause 21 of the agreement dated 10.10.2011, 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 10.04.2015 which has already lapsed. and therefore the respondent is liable to pay interest on the delayed possession. Thus the complainant is 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.

35. With respect to issue no 3, 4 and 5, these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainants has only averred 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

36. 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.

37. The authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Another. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration



even if the agreement between the parties had an arbitration clause.

38. Further, in ***Aftab Singh and others. v. Emaar MGF Land Ltd and others., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

39. In the present case, as per clause 21 of the flat buyer agreement dated 10.10.2011 for unit No. C051, Tower C, 5th floor in the 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 10.4.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,60,85,443/- to the respondent. Project was registered but the date of completion of project has elapsed on 31.8.2018 as per registration certificate. Counsel for the respondent stated that they have applied for extension of registration and the revised date of delivery of possession is March 2019. Project in question is badly delayed.



Decision and directions of the authority

40. After taking into consideration all the material facts as adduced and produced by both the parties, 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 respondent in the interest of justice and fair play :

- i. As per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 the respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f 10.4.2015 till the date of handing over the offer of possession of the booked unit failing which the complainant is entitled to refund the amount.
- ii. The arrears of interest accrued so far from the due date of delivery of possession i.e 10.04.2015 to the date of present order i.e 07.12.2018 amounting to Rs 63,24,158/- shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest i.e Rs 1,44,098.77/- till handing over the possession shall be paid before 10th of subsequent months.



41. Complaint is disposed of accordingly.

42. 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

