

PROCEEDINGS OF THE DAY

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| Day and Date | Friday and 07.12.2018 |
| Complaint No. | 549/2018 Case Titled As Captain Chitra Manchandani & Anr V/S M/S Athena Infrastructure Ltd. |
| Complainant | Captain Chitra Manchandani & Anr |
| Represented through | Shri Vaibhav Suri Advocate for the complainant. |
| Respondent | M/S Athena Infrastructure Ltd. |
| Respondent Represented through | Shri Rahul Yadav Advocate for the respondent. |
| Last date of hearing | 13.9.2018 |
| Proceeding Recorded by | Naresh Kumari |

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.

Respondent has stated that he had already received occupation certificate on 6.4.2018 and he had sent possession letter to the buyer on **25.4.2018**.

As per clause 22 of the Flat Buyer Agreement dated 6.7.2011 for unit No.E-0701, 7th floor, Tower-E, 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 **6.1.2015**. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,90,34,539/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f **6.1.2015** 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. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

Complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)
7.12.2018

Subhash Chander Kush
(Member)
7.12.2018

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

Complaint no. : 549 of 2018
First date of hearing: 13.09.2018
Date of decision : 07.12.2018

Mrs. Chitra Mirchandani & Mr. Rajesh
R/o. 1/198, first floor, sadar Bazar road, Delhi **Complainants**
Cantt. New Delhi- 110010

Versus

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

CORAM:

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

APPEARANCE:

Shri Vaibhav Suri **Advocate for the complainants**
Shri Rahul Yadav **Advocate for the respondent**

ORDER

1. A complaint dated 18.07.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Mrs Chitra Mirchandani & Mr. Rajesh Mirchandani, against the promoter M/s Athena Infrastructure Ltd .in respect of apartment/unit described below in the project 'Indiabulls Engima', Sector-110,



Gurugram of clause 21 of the flat buyers agreement at 06.07.2011 by not delivering the possession of the unit by due date i.e on 06.01.2015.

2. Since, the buyer's agreement has been executed on 06.07.2011 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(Phase 1) |
| 4. | RERA Registration no. | 351 of 2017 |
| 5. | Apartment/unit no. | E-071,7 th floor, tower E |
| 6. | Total area admeasuring | 9880 sq.ft. (360.46 sq.mtrs.) |
| 7. | Payment plan | |
| 8. | Date of execution of flat buyer's agreement | 06.07.2011 |



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| 9. | Total consideration as per the as per the receipts attached with the complaint | Rs. 1,93,12,283/- |
| 10. | Total amount paid by the complainant till date as per the receipts attached with the complaint | Rs. 1,90,34,539/- |
| 11. | Date of delivery of possession Clause 22 – 3 years plus 6 month grace period from the execution of flat buyer agreement. | 06.01.2015 |
| 12. | Penalty clause (clause 23) | Rs. 5/- per sq. ft. per month of the super area per month for the period of delay |

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 06.07.2011 is available on record. The respondent has failed to fulfil its contractual obligation till date by not delivering the possession.

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 has been filed by the respondent on 13.09.2018 which has been perused.



Facts of the case

6. Briefly stating the facts of the complaint, are that the complainants booked a residential flat in the project of the respondent namely “Indiabulls Enigma” at Sector 110, Gurugram in Pawala Khusrupur Village, Gurugram Tehsil, Gurugram.
7. The representatives of Indiabulls Real Estate Ltd. represented to the complainants that Indiabulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd. The complainants were 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 will 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. The complainants were further induced to sign a pre-printed flat buyer agreement dated 06.07.2011 and vide aforesaid FBA



the respondent allotted flat bearing no. E-071 on 7th floor in tower no. E, admeasuring super area of 3880 sq.ft. to the complainants.

9. The complainants have paid a total sum of Rs. 1,90,34,539/- 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.
10. The respondent had promised to complete the project within a period of 36 months from the date of execution of the Builder Buyer Agreement with a further grace period of six months. The flat buyer's agreement was executed on 21.02.2011 and till date the construction is not complete.
11. The respondent has failed to complete the project in time, resulting in extreme kind of mental distress, pain and agony to the complainants.



12. 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 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.



15. That 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.



16. The 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 05.08.2018 refunded the excess amount of Rs. 3,49,199/-.The respondent did not pay any interest to the complainants on the amount of Rs. 3,49,199/- 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.

17. The respondent for a long time did not provide the complainants with status of the project. It is pertinent to mention that on 25.04.2018 the Complainant received a letter from the respondent, wherein it is mentioned that the Respondent has received occupation certificate for tower- 'A' from Director General, Town and Country Planning Department and is thereby offering possession to the complainants subject to complainants paying the balance sale consideration. The said demand letter is totally sham as it has been issued with ulterior motives to extract money. The project is totally incomplete, and the promised amenities and facilities are missing. The alleged occupancy certificate seems to have been obtained by the respondent in collusion with



authorities. The project is far from complete and the respondent has raised illegal demands. Thus, the respondent has not acted bonafide and has suppressed the interest of the complainants and other homebuyers. Even the statement of account enclosed with the demand letter is an assortment of unreasonable and creative accounting. Moreover the occupation certificate for part one of one tower of the total project cannot substitute completion certificate. It will be practically impossible for occupants in tower-E to take possession and stay in the apartment when massive construction will be going on in vicinity.

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

19. **Issues Raised By the Complainants :**

- (i) **Whether the respondent has unjustifiably delayed the construction and development of the project in question?**



- (ii) Whether the respondent is liable to pay the delay interest @18% p.a.?
- (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?

20. Relief sought:

- (i) Direct the respondent 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 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.**

(iv) **Direct the respondents to pay a sum of Rs. 50,000/- to the complainant towards the cost of the litigation.**

Respondent's Reply

21. 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 Hon’ble Authority. The instant complaint filed by



the Complainants before the Hon'ble 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 complainant(s) 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.

22. 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*.

23. 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 Ld. Adjudicating Officer and this authority may dismiss the same forthwith.

24. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. FBA dated 06.07.2011. 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 the alleged delay in delivery of possession of the provisionally booked unit however the Complainants with malafide intention have not disclosed, and concealed the material fact from this Hon'ble Authority that the Complainants have been a willful 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 Hon'ble 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.

25. 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 23**” of duly executed FBA, which is at page 69 of the FBA filed by the Complainants along with their complaint.

26. 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.

27. The respondent also submitted that he has already completed the construction of the “Tower E” and will be applying for grant



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

28. 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 06.07.2011 and incorporated them in “**Clause 40**” of FBA.



29. 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.

30. 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 06.07.2011 was executed much prior to coming into force of the RERA Act, 2016 and the HARERA 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.



31. 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

32. With respect to **issue no. one** the complainants have failed to produce any evidence in support of their allegation.

33. With respect to **issue no. two and three** 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 06.07.2011, 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 06.01.2015 which has already lapsed. However, the respondent has failed to deliver the possession within the stipulated time. 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. 21.08.2015 till the offer of possession.

34. 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 complainant has only dealt these issues in the mere facts of the complaint and no documents



have been annexed in respect of the same, thus issues cannot be determined for the want of supportive evidence.

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.

36. 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 & Anr. (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.

37. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., 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.
38. Keeping in view the present status of the project and intervening circumstances, the authority is of the considered opinion that the respondent has failed to deliver the possession of the subject flatt to the complainants by the committed date and the possession has been delayed more than 3 years. Thus, the complainants are entitled to interest at prescribed rate for every month of delay till the handing over of the possession.



39. The authority is of the view that the respondent has already received occupation certificate on 06.04.2018 and he had sent possession letter to the buyer on 25.04.2018.

Decision and directions of the authority

40. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- (i) The respondent is directed to pay interest @ 10.75% p.a. on the paid amount by the complainant from the due date of delivery of possession i.e. 06.01.2015 till the date of offer of possession i.e 25.04.2018 for the delay occurred in delivery of possession.
- (ii) The arrears of interest so accrued @ 10.75% p.a. from the due date of delivery of possession till the order of order on the paid amount of the complainants which comes to be Rs. 81,22,275.95/- shall be paid to the complainants within 90 days from the date of this order. The respondent is further directed to act in accordance with the provision of section 18(1) of the



Act ibid i.e. to adjust the amount @ 10.75% p.a. towards the delayed possession.

(iii) Thereafter, the monthly payment of interest i.e. Rs. 1,70,517.75/- till handing over of the possession, so accrues shall be paid before 10th of subsequent month.

(iv) If the possession is not given by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. section 19(4) of the Act ibid.

40. The complaint is disposed of accordingly.

41. The order is pronounced.

42. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Date: 07.12.2018

Judgement Uploaded on 09.01.2019