

PROCEEDINGS OF THE DAY

Day and Date	Friday and 07.12.2018
Complaint No.	546/2018 Case Titled As Mr. Samir Shah & Anr, V/S M/S Athena Infrastructure Ltd
Complainant	Mr. Samir Shah & 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

Proceedings

Shri Rahul Yadav Advocate has appeared and filed power of attorney on behalf of the respondent today.

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 17.7.2018 and he has not resolved the matter w.r.t payment of delayed possession charges i.e. @ 10.75% as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The respondent has rather given him a ledger of account vide which he has adjusted only delayed possession charges as per BBA which is not reasonable and in accordance with law. The builder as well as buyer shall be equitable in charging interest @ 10.75% on

both sides i.e. default of buyer to make payment and delayed possession charges.

As per clause 21 of the Flat Buyer Agreement dated 13.7.2011, for unit No.A152, 15th floor, Tower-A in Indiabulls Enigma, Sector-110, Gurugram possession was to be handed over to the complainant within a period of 36 months + 6 months grace period which comes out to be 13.1.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,61,95,074/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f **13.1.2015** till the date of offer of possession i.e. 17.7.2018 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)

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

Complaint No. : 546 of 2018
First date of hearing: 13.09.2018
Date of Decision : 07.12.2018

Mr. Samir Shah and Mrs. Sangeeta Shah
R/o. A-503,Sheetal Vihar, Plot no. 10,
Sector 23, Dwarka, New Delhi.

Complainants

Versus

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

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vaibhav Suri
Shri Rahul Yadav

Advocate for the complainants
Advocate for the respondent

ORDER

1. A complaint dated 18.07.2018 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 complainants, Mr. Samir Shah and Mrs. Sangeeta Shah, against the promoter, M/s Athena Infrastructure Pvt. Ltd., on account of violation of the



clause 21 of the flat buyer's agreement executed on 13.07.2011 in respect of flat no.A152, 15th floor, block/tower A, admeasuring 3,400 sq. ft. super area, in the project 'Indiabulls enigma' for not handing over possession on the due date i.e. 13.01.2015, but on 17.07.2018 after a delay of one and a half years, which is an obligation under section 11(4)(a) of the Act *ibid.*

2. Since, the buyer's agreement has been executed on 13.07.2011 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be 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", sector 110, Gurugram
2.	Nature of real estate project	Residential complex
3.	DTCP license no.	Not mentioned
4.	Apartment/unit no.	A152 on 15 th floor, tower A
5.	Apartment measuring	3,400 sq. ft. super area
6.	RERA registered/ unregistered.	Registered vide no. 351



		of 2017
7.	Booking date	25.03.2011
8.	Date of execution of flat buyer's agreement	13.07.2011
9.	Payment plan	Construction linked payment plan
10.	Total consideration	Rs.1,74,16,334/-
11.	Total amount paid by the complainants as per SOA	Rs.1,61,96,745/-
12.	Percentage of consideration amount	93% approx.
13.	Due date of delivery of possession as per clause 21 of flat buyer's agreement dt. 13.07.2011 (3 years + 6 months' grace period from the date of execution of agreement)	13.1.2015
14.	Date of offer of possession	17.07.2018
15.	Delay in handing over possession	3 years and 6 month.
16.	Penalty clause as per flat buyer's agreement dated 31.05.2012	Clause 22 of the agreement i.e. Rs.5/- per sq. ft per month of the super area.
17.	Revised date of delivery of possession as per RERA certificate	31.08.2018 (expired but the respondent has applied for extension in which the revised dated is mentioned as 31.03.2019)



4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants and the respondent. A flat buyer's agreement dated 13.07.2011 is available on record for the aforesaid flat no. A 154, 15th floor in tower A of the project, according to which the possession of the same was to be

delivered by 13.01.2016. The respondent has not delivered the possession of the subject flat within stipulated period which is an obligation under section 11(4)(a) of the Act ibid.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent's counsel appeared on 13.09.2018. The case came up for hearing on 13.09.2018 and 07.12.2018. The reply filed by the respondent which has been perused. The respondent has supplied the details and status of the project along with the reply.

Facts of the complaint

6. Briefly stated, the facts relevant for the disposal of the present complaint are that in March, 2011 complainants booked a residential flat in the project of the respondent namely, "Indiabulls enigma" at sector-110, Gurugram. 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. It was also represented that all necessary sanctions and



approvals had been obtained to complete same within the promised time frame.

7. The complainants submitted that pursuant to the aforesaid booking of the flat, respondent vide allotment letter allotted flat no. A152 on 15th floor, tower A of the project in favour of the complainants. A flat buyer's agreement 13.07.2011 simultaneously was executed between the parties.
8. The complainants have paid a total sum of Rs. 1,61,95,745/- as against the total consideration of Rs. 1,74,16,334/- towards the aforesaid residential flat in the project under the construction linked payment plan as and when demanded by the respondent.
9. The complainants alleged that the respondent had promised to complete the project within a period of 3 years from the date of execution of the flat buyer's agreement dated 13.07.2011 with a further grace period of 6 months. The flat buyer agreement was executed but till date construction is not complete. This has caused the complainants mental distress, pain and agony. The project Indiabulls Enigma comprises of towers A to J. 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 the respondent. It was presented to the complainants that towers A to D will have 17 floors but the respondent and Varali changed the original plan without taking the consent of the allottee and increased 4 floors in towers A to D, it changed the theme of the project and therefore, will create extra burden on the common amenities and facilities.

10. The complainants stated that they have made visits at the site and observed that there was serious quality issues with respect to the construction carried out by respondents till now. The flats were sold by representing that the same luxurious apartment however, all such representations seem to have been made in order to lure the complainants to purchase the flat at extremely high prices. The respondent has compromised with levels of quality and are guilty of mis-selling. The respondent has illegally charged car parking usage charges. The respondent also over charged EDC and IDC and has misrepresentation regarding the claim of VAT. They have also wrongfully charged PLC and Service tax. The



respondents have breached the fundamental term of the contract by inordinately delaying in delivery of possession.

11. Issues to be decided:

- i. Whether the respondent made false representations about the project in question in order to induce the complainants to make a booking?
- ii. Whether the respondent delayed in handing over the possession of the project?
- iii. Whether the respondent is liable to pay the delay interest @18% p.a. till possession is handed over to the complainants?
- iv. Whether the respondent has over charged EDC/ IDC?
- v. Whether the respondent has wrongfully resorted to increase in floors 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?



12. Relief sought:

The complainants are seeking the following reliefs:

- i. Award delay interest @ 18% p.a. for every month of delay, till the handing over of possession.
- ii. Direct the respondent to provide the schedule of construction and also to rectify the breached with regard to extra EDC/IDC charges, wrongfully charging of parking, VAT, service tax, PLC as well as wrongly inflating the super area.
- iii. Direct the respondent to pay a sum of Rs. 50,000/- to the complainants towards the cost of litigation.

Respondent's reply

13. 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 complainants has chosen to file the instant complaint for adjudication of its grievances before the adjudicating officer under section 31 of the RERA Act, 2016.



Thus, this hon'ble authority does have any jurisdiction to entertain the same and the complaint is liable to be dismissed.

14. The allegations made in the instant complaint are wrong, incorrect and baseless in the fact of law. The respondent denies them in toto. As per the flat buyer agreement duly executed between the parties, it was specially agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement, clause 49 buyer agreement it has been mentioned that the dispute shall first go for arbitration.

15. The respondent contended that 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, the complainants with mala fide intention hid the fact from this hon'ble authority that they on many occasions were the defaulters in making the payment of installments. The complainants after being satisfied in totality expressed their 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 transferred in their joint name from the initial owner. The respondents have already completed the construction of the tower H and have also applied for the grant of occupational certificate before the concerned authority. The delay in delivering the possession was beyond the control of the respondent since number of approvals have to be taken from various authorities. In addition the problem related to labour/raw material and government restrictions including the National Green Tribunal which imposed ban on the construction in Delhi- NCR for several months, the respondent kept on the work moving steadily. The complainants have made false and baseless allegations with a mischievous intention.

16. The respondent denied the allegation that no consent was sought from the complainants for increasing the floors or that the respondent has increased the floors in a secretive manner. It is submitted by the respondent the increase in floors were made in accordance with revised building plans dated 23.08.2013 by DTCP with no objections from the allottees.



17. The respondent has contended that the complainants have concealed the fact from the authority that the respondent vide letter dated 17.07.2018 already offered the possession of the booked flat. The complainants have filed the present complaint just to take benefits of the provisions of the RERA Act, 2016 and to harass the respondent.

Determination of issues:

18. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

- i. With respect to the **issue i** raised by the complainants the complainants have failed to adduce any evidence in support of their allegation that respondent has induce or forced the complainants to make the booking.
- ii. With respect to the **issue ii and iii** raised by the complainants the authority came across that as per clause 21 of flat buyer's agreement, the possession of the flat was to be handed over within 3 years plus 6 months' grace period from the date of execution of agreement dated 13.07.2011. Accordingly, the due date



of possession was 13.01.2015 and the possession has been offered vide letter dated 17.07.2018 i.e. after a delay of three and a half years. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the carpet area of the said flat as per clause 22 of flat buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para **181 of Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors.** (W.P 2737 of 2017), wherein the Bombay HC bench held that:

"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."

As the possession of the flat was to be delivered by 02.05.2015 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate



(Regulation and Development) Act, 2016. Hence, the respondent is liable to pay interest to the complainants, at the prescribed rate for every month of delay till the date of offer of possession.

The complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.

19. With respect to **issue iv, v and vi** raised by the complainants, the complainants adduced no iota of evidence in support but made only bare assertion/allegation with respect to wrongful increase in the EDC, IDC etc., Hence these issues are not sustainable in the eyes of law for the want of documentary evidence.

Findings of the authority

20. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to 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.

21. 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.
22. 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 and 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.



23. 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. This view has been upheld by the Supreme Court - in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.
24. During the course of arguments, it has been alleged by the counsel for the complainants that the respondent has offered possession on 17.07.2018 but had resolved the matter with respect to payment of delayed possession charges as per the terms of agreement dated 13.07.2011 which is not reasonable and in accordance with law. The builder as well as buyer shall be equitable in charging interest @ 10.75% p.a. on both sides i.e. default of buyer to make payment and delayed possession charges to be payable by the respondent as per the provision of section 18(1) of the Real Estate (Regulation and Development) Act, 2016.



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

34 (f) Function of Authority –

To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

26. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

Decision and directions of the authority

27. 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. The respondent is directed to pay delay possession charges @ 10.75% p.a. on the paid amount to the complainants from the due date of delivery of possession i.e. 31.11.2015 till 17.07.2018 (date of offer of possession) amounting to Rs.61,10,721.27/-.
 - ii. The arrears of interest so accrued @ 10.75% p.a. so far shall be paid to the complainants within 90 days from the date of this order.
28. The order is pronounced.
29. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated.....

