

PROCEEDINGS OF THE DAY

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| Day and Date | Tuesday and 11.12.2018 |
| Complaint No. | 585/2018 case titled as Mr. Baljeet Singh Ahuja & anr V/S M/S Athena Infrastructure Ltd. |
| Complainant | Mr. Baljeet Singh Ahuja & 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 | 20.9.2018 |
| Proceeding Recorded by | Naresh Kumari |

Proceedings

Arguments heard.

The main contention w.r.t. builder/respondent and buyer/complainant is w.r.t. charging of consideration amount i.e. Rs.2,17,69,223/- out of which an amount of Rs.2,00,59,697/- has already been paid which includes charges towards delayed possession at the rate as mentioned in BBA i.e. Rs.5/- per sq. feet which is not applicable as on date since the RERA Act has come into being.

As per clause 20 of the Builder Buyer Agreement dated 5.3.2012 for unit No.A002 Ground Floor, Tower-A in Indiabulls Enigma in Pawala Khusrupur, Gurugram, possession was to be handed over to the complainant

within a period of 3 years + 6 months grace period which comes out to be 5.9.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.2,00,59,697/- against total sale consideration amount of Rs. 2,17,69,223/-.

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 **15.8.2019** and as such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f **5.9.2015** 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 seek refund of the amount with interest.

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.

Both the builder and buyer are directed to calculate their remaining amount by including delayed possession charges at the prescribed rate i.e.10.75% per annum.

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

Samir Kumar
(Member)
11.12.2018

Subhash Chander Kush
(Member)
11.12.2018

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

Complaint no. : 585 of 2018
First date of hearing: 20.09.2010
Date of decision : 11.12.2018

Mr. Baljit Singh Ahuja
Mrs. Gurpreet Kaur Ahuja
Both R/o A-414, LGF, Defence Colony, New
Delhi-110024

Complainants

Versus

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

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Vaibhav Suri Advocate for the complainants
Mr. Rahul Yadav Advocate for the respondent

BRIEF

1. A complaint dated 24.07.2018 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. Baljit Singh Ahuja and Mrs. Gurpreet Kaur Ahuja, against the promoter M/s Athena Infrastructure Ltd. in respect of



apartment described below in the project 'India bulls enigma', on account of violation clause 20 of the builder buyer agreement dated 05.03.2012 in respect of unit no. A002, ground floor in tower no. A with respect to super area of 3400 sq. ft. for not handing over possession by due date i.e. 05.09.2015 which is an obligation of the promoter under section 11(4)(a) of Act *ibid*.

2. Since, the buyer's agreement has been executed on 05.03.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint case are as under: -

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| 1. | Name and location of the project | India bulls enigma in Pawala Khusrupur Village, Gurgaon Tehsil and District Gurgaon |
| 2. | Nature of the project | Residential |
| 3. | RERA registered/ not registered. | Registered (351 of 2017) |
| 4. | Revised date of completion as per registration certificate | 31.08.2018 |



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|-----|---|---|
| 5. | The respondent applied for extension of registration and revised date of possession is | 15.08.2019 |
| 6. | Apartment/unit no. | A-002, ground floor in tower A |
| 7. | Apartment measuring | 3400 sq. ft. |
| 8. | Payment plan | Construction linked payment plan |
| 9. | Date of execution of buyer's agreement | 05.03.2012 |
| 10. | Total consideration | Rs. 2,17,69,223/- |
| 11. | Total amount paid by the complainant till date as per the receipts attached with the complaint | Rs.2,00,59,697/- |
| 12. | Date of delivery of possession Clause 20 – 3 years plus 6-month grace period from the execution of flat buyer agreement. | 05.09.2015 |
| 13. | Delay of number of months/years | 3 years 3 months |
| 14. | Penalty clause (clause 21) | 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. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The case came up for hearing on 20.09.2018 and 11.12.2018. The reply has been filed on behalf of the respondent which has been perused.



Facts of the case

5. That the complainants booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon.
6. The complainants submitted that they 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 shall be one of its kind. It was also represented that all necessary sanctions and approvals had been obtained to complete the same within promised time frame.
7. That the complainants were induced to sign a pre-printed flat buyer agreement dated 05.03.2012 and vide aforesaid FBA the respondent allotted flat bearing no. A-002 on ground floor in tower no. A, admeasuring super area of 3400 sq. ft. to the complainants.
8. The complainants submitted that they have paid a total sum of Rs. 2,00,59,697/- towards the aforesaid residential flat in the project from 2012 to 2015 as and when demanded by the respondent. It is pertinent to state that the respondent collected more than 95% of the sale consideration by the year 2015, 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.

9. 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 builder buyer agreement with a further grace period of six months. The flat buyer's agreement was executed on 05.03.2012 and till date the construction is not complete.
10. The complainants submitted 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 complainants 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.
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 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. Further, submitted that the respondent did not seek the consent of the complainants for increasing the floors an increased the floors in a secretive manner.

12. The complainants submitted that 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 complainants 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.

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. 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 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/ promoter finally on 05.08.2016 adjusted the excess amount of Rs. 3,06,000/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,06,000/- 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 05.03.2012 the project was to be completed in 3 years with grace period of six months. Further, the complainants submitted that the respondent for a long time did not provide them with status of the project. It is pertinent to mention that on 03.07.2018 the complainant received a letter from the respondent, wherein it is mentioned that the respondent has received occupation certificate for tower- 'A' from DTCP 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.



16. **Issues to be decided:**

- 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% 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?
17. Relief sought:
- i. Direct the respondent to 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 to rectify the breaches with regard to extra EDC /IDC charges, VAT, service tax as well as for wrongfully inflating the super area.

Respondent's reply

18. 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 merit and had



been preferred with sole motive to harass the respondent. In fact, the present complaint is liable to be dismissed in view of section 71 of the RERA, 2016. The present complaint is not maintainable before this hon'ble authority has no jurisdiction to entertain the same and the complaint is liable to be dismissed.

19. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact of law. The respondent denies them in toto. Nothing stated in the said complaint shall be deemed to be admitted by the respondent merely on account of non-transverse, unless the same is specifically admitted herein. The instant complaint is devoid of any merits and has been preferred with the sole motive to extract monies from the respondent, hence the same is liable to be dismissed.

20. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. FBA dated 05.03.2012. Further, submitted that complainants have been willful defaulters from the beginning and not paying the installments as per the payment plan opted by them.



21. The respondent submitted that it was in knowledge of the complainants, that there is a mechanism detailed in the FBA which covers the “clause 21” of duly executed FBA, which is being reproduced hereunder:

“ Clause 21: In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay as stipulated herein, except for the delay attributable to the Buyer/ force majeure/vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- per sq. ft. per month for the period of delay....”

22. The respondent submitted that they have already completed the construction of “tower A” and also obtained OC for the said tower and have already initiated the process of handing over of possession of tower A to the respective buyers. It is also submitted that they are under the process of handing over of possession of the unit of the said tower including the unit of the complainant in question.

23. The respondent submitted that as per the FBA dated 05.03.2012, executed prior to coming into force of the Real Estate (Regulation And Development) Act, 2016. Further, the adjudication of the instant complaint for the purpose of granting interest and compensation as provided under the Act has to be in reference to the agreement for sale executed in terms of the said Act and rules and no other agreement, whereas, the FBA being referred to or looked into in this



proceeding is an agreement executed much before the commencement of the Act.

24. The respondent submitted that the respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of "INDIABULLS ENGIMA" 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.

25. **Determination of issues**

i. With respect to **issue no. 1** the respondent is liable to pay interest on the delayed possession. This is fortified from the fact that as per clause 20 of the agreement dated 05.03.2012, the construction was to be completed within a period of 3 years with a grace period of six months. The due date of possession comes out to be 05.09.2015 which has already lapsed. 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. 05.09.2015 till the offer of possession.



- ii. With respect to the **second 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.
- iii. With respect to **issue no 3 and 4** 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.

Findings of the authority

26. 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 Department of Town & Country Planning, 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.

27. The main contention w.r.t. builder and buyer is w.r.t. charging of consideration amount i.e. Rs.2,17,69,223/- out of which an amount of Rs.2,00,59,697/- has already been paid which includes charges towards delayed possession at the rate as mentioned in BBA i.e. Rs.5/- per sq. feet which is not applicable as on date since the RERA Act has come into force. As per clause 20 of the builder buyer agreement dated 05.03.2012 for unit no. A002 ground floor, tower-A in Indiabulls Enigma in Pawala Khusrupur, Gurugram, possession was to be handed over to the complainant within a period of 3 years + 6 months grace period which comes out to be 05.09.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.2,00,59,697/- against total sale consideration amount of Rs. 2,17,69,223/-. Project was registered but the date of completion of project has elapsed on 31.08.2018 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



15.08.2019 and as such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f **05.09.2015** 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 seek refund of the amount with interest.

Decision and directions of the authority

28. 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 the interest at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession i.e. 05.09.2015 till the actual date of handing over of the possession.

(ii) The respondent is directed to pay interest accrued from 05.09.2015 to 11.12.2018 i.e. Rs. 70,48,235.59/- on account of delay in handing over of possession 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.

29. The order is pronounced
30. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.12.2018

Judgement Uploaded on 11.01.2019

HARERA
GURUGRAM

