

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 11.12.2018
Complaint No.	588/2018 Case Titled As Gp Capt. Gurmeet Singh & Anr. V/S M/S Athena Infrastructure Ltd.
Complainant	GP Capt. Gurmeet Singh & 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.

As per clause 21 of the Builder Buyer Agreement dated 26.12.2012, for unit No. 1071, Block-J, in Indiabulls Enigma, Sector-110, Gurugram possession was to be handed over to the complainant within a period of 3 years + 6 months which comes out to be 26.6.2016. Complainant has already deposited Rs.3,02,22,861 /- against total sale consideration amount of Rs.3,14,22,200/-. However, the respondent has not delivered the unit in time, as such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f 26.6.2016, as per the provisions of section 18 (1) of the Real Estate (Regulation &

Development) Act, 2016 till the handing over the offer of possession failing which the complainant is entitled to seek refund of the amount with interest.

The respondent has submitted a copy of occupation certificate dated 17.9.2018 which is placed on record.

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)
11.12.2018

Subhash Chander Kush
(Member)
11.12.2018

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

Complaint no. : 588 of 2018
First date of hearing: 20.09.2018
Date of decision : 11.12.2018

1.Mr. Gurmeet Singh Randhawa
2.Mrs. Kavneet Randhawa
H.no. 3230, ground floor, sector 23,HUDA,
Gurugram

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

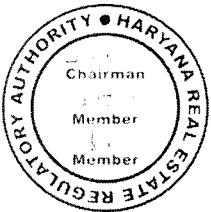
APPEARANCE:

Shri Vaibhav Suri
Shri Rahul Yadav

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 24.07.2018 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 complainant Mr. Gurmeet Singh Randhawa and Mrs. Kavneet Randhawa, against the promoter M/s Athena Infrastructure Ltd. in respect of unit described below in the project 'Indiabulls Enigma', on



account of violation clause 21 of the flat buyer agreement dated 26.12.2012 in respect of flat no. J071 ground floor in tower H75, with respect to super area of 3880 sq. ft. for not handing over possession on due date i.e. 26.06.2015 which is an obligation under section 11(4)(a) of act ibid.

2. Since, the flat buyer's agreement has been executed on 26.12.2012 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: -

1.	Name and location of the project	Indiabulls Enigma, sector 110, Gurugram
2.	Nature of the project	Residential complex
3.	RERA registered/ not registered.	Registered (351 of 2017)
4.	Revised date of completion	31.08.2018 (expired but respondent has applied for extension whereas the revised date of delivery of possession is mentioned as March, 2019)
5.	Apartment/unit no.	J071, block J



6.	Apartment measuring	3880 sq. ft.
7.	Payment plan	Construction linked payment plan
8.	Date of execution of buyer's agreement	26.12.2012
9.	Total consideration	Rs.3,14,22,200/-
10.	Total amount paid by the complainant	Rs.3,02,22,861/-
11.	Date of delivery of possession Clause 21 - 3 years plus 6-month grace period from the execution of flat buyer agreement.	26.06.2016
12.	Delay in handing over the possession	2 years 6 months
13.	Penalty clause (clause 22)	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's agreement is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 26.06.2016. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ 5 % per sq. ft per month of the carpet area of the said flat for the period of such delay as per clause 22 of the buyer's agreement dated 26.12.2012.

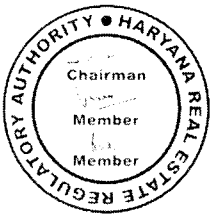


therefore, the promotor has not fulfilled his committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. Accordingly, the respondent appeared on 11.12.2018. The case come up for hearing on 11.12.2018. the reply has been filed by the respondent has been perused.

Facts of the case

6. The complainant submitted that he has 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 he was induced to sign a pre-printed flat buyer agreement dated 26.12.2012 and vide aforesaid FBA the respondent allotted flat bearing no. 001 on block H, admeasuring super area of 3880 sq. ft. to the complainants.
8. The complainants submitted that they changed their flat from H001 to J071 in year 2015. The respondent had executed a



fresh flat buyer agreement for flat bearing no. J071 on 23.10.2015. The new flat i.e. J071 is identical in design, area and sale consideration. It is clearly mentioned by respondents through emails that for the purpose of calculating delay penalty on the account of delay in delivery of possession and time period for offering possession shall be calculated by taking into the consideration the date of the initial flat buyer agreement which was executed on 26.12.2012.

9. The complainants submitted that they have paid a total sum of Rs. 3,02,22,861/- towards the aforesaid residential flat in the project. It is pertinent to state that the respondent collected more than 95% of the sale consideration by year 2013, which is also in terms with the construction linked payment plan.



10. The complainants submitted that respondent had promised to complete the project within a period of 36 months from the date of execution of the flat buyer agreement with a further grace period of six months. The flat buyer's

agreement was executed on 26.12.2012 and till date the construction is not complete.

11. The complainants submitted that respondent has failed to complete the project in time, resulting in extreme kind of mental distress, pain and agony to the complainants.
12. 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; which shall ultimately disturb the density of the colony and its basic design attraction; and will create an extra burden on the common amenities and facilities.



13. 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 towers 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 complainants submitted that respondent did not seek the consent of the complainants for increasing the floors and increased the floors in a secretive manner. It is stated that the enhancement of FAR is in total violation of representations made in the respondent advertisement material displayed at site as well as on the internet.
15. 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



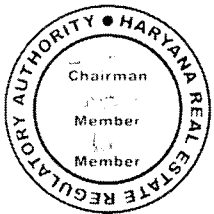
unconscionable act is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. In this regard, it is pertinent to note that the respondent has the complete contact details including phone numbers 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 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 the levels of quality and are guilty of mis-selling.

17. The complainants submitted that respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. The complainants after gaining information about illegal collection of EDC/IDC on numerous occasions approached the respondent at its premises and requested for the refund of excess amount.
18. 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 26.12.2012 and the project was to be completed in 3 years with grace period of six months. The respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. The project has been inordinately delayed.



19. The complainants submitted that they are 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. The original date of possession ought to be counted on expiry of three years from date of first payment.

Issues to be decided:

1. Whether the respondent has unjustifiably delayed the construction and development of the project in question?
2. Whether the respondent/ promoter has over charged EDC, IDC?
3. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
4. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?



Relief sought:

In view of the facts mentioned above, the complainants prays for the following relief(s)

- a) 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;

- b) 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.

Reply

20. The respondent submitted the fact that the instant complaint is not maintainable, on facts or law, and is as such liable to be dismissed at the threshold being filed in wrong provisions of the law. The present complaint is devoid of any merits and has 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 had chosen to file the instant complaint for adjudication of its grievances before the adjudicating officer. Thus, this hon'ble authority does have any jurisdiction to entertain the same and the complaint is liable to be dismissed.



21. 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.

22. The respondent submitted that instant complaint filed by the complainant is outside the preview of this hon'ble authority as the complainants themselves approached the respondent and showed their interest to book unit in the project to be developed by the respondent. Thereafter the complainants post understanding the terms and condition of agreement had voluntarily executed flat buyer agreement with the respondent on 26.12.2012, it was specifically 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.



23. The respondent submitted that the FBA dated 26.12.2012, was executed prior to coming into force of the Real Estate (Regulation and Development) Act, 2016. 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 nullified intention have

not disclosed, in fact concealed the material facts from this hon'ble authority. The complainants have been willful defaulters from the beginning and not paying the installments as per the payment plan.

24. The respondent submitted that the complainants having given consent to the incorporation of clause 22 of the FBA filed them along with their complaint, are now evading from the truth of its existences and does not seems to be satisfied with the amount offered in lieu of delay. The respondent carves leave of this hon'ble authority to refer which is reproduced hereunder for ready reference:

"Clause 22 in the eventuality of developer failing to offer the possession of the unit to buyer within the time 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"

25. The respondent submitted that they have already completed the construction of tower J and have also obtained OC for the concerned tower and have already initiated the process of handing over of possession of tower J to the respective buyers.



26. The respondent submitted that, 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 RERA 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 said Act.
27. The respondent submitted that the complainants have made baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in the FBA. In view of the same, it is submitted that there is no cause of action in favor of the complainants to institute the present complaint.



Determination of issue

28. With respect to **first issue** raised by the complainants, 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 26.12.2012, 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 26.06.2016 which has already lapsed. Thus, the complainants are entitled for interest on the delayed possession at the prescribed rate under the RERA Act. Delay charges will accrue from the due date of possession i.e. 26.06.2016 till the offer of possession.

29. With respect to the **second issue**, as per clause 6(vii) of the flat 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 terms of the agreement
30. With respect to **third and fourth issue** 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

31. The authority has complete subject matter jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & 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.

32. 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.

33. 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

Decision and direction of the authority

34. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments , the authority is of the view that as per clause 21 of the flat buyer agreement dated 26.12.2012, for unit no. J071, block-J, in Indiabulls Enigma, Sector-110, Gurugram possession was to be handed over to the complainant within a period of 3 years + 6 months which comes out to be 26.06.2016. Complainants have already deposited Rs.3,02,22,861 /- against total sale



consideration amount of Rs. 3,14,22,200/-. However, the respondent has not delivered the said unit in time, as such, complainants are entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f 26.6.2016, amounting to Rs. 79,93,325.50/- as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till the handing over the offer of possession failing which the complainants are entitled to seek refund of the amount with interest. The respondent has submitted a copy of occupation certificate dated 17.9.2018 which is placed on record.

35. The authority u/s 37 issues the following directions:

- a. 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.
- b. Thereafter the respondent shall pay monthly interest amounting Rs. 270746.47/- to be paid by 10th of every subsequent month on paid amount of the complainant.




c. After adjustment of already adjusted amount, the balance interest amount accrued so far at the rate of 10.75% shall be paid amounting Rs. 79,93,325.50/-to the complainants within 90 days from the date of this order.

36. The complaint is disposed of accordingly.

37. The File be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Dated:11.12.2018

Judgement Uploaded on 11.01.2019

