

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

Complaint no. : 799 of 2018
First date of hearing: 20.12.2018
Date of decision : 20.12.2018

Mr. Dinesh Arora & Ors.
R/o. : D-1/3, Block D, Hauz Khas, New Delhi- 110016 **Complainants**

Versus

M/s Athena Infrastructure Ltd. **Respondent**
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 of complainants**
Shri Rahul Yadav **Advocate for the respondent**

ORDER

1. A complaint dated 31.08.2018 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. Dinesh Arora and Ors., against the promoter M/s Athena Infrastructure Ltd .in respect of apartment/unit described



below in the project 'Indiabulla Engima', on account of violation of the section 11(4)(a) of the Act ibid.

2. Since, the flat buyer's agreement has been executed on 29.02.2012 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	India bulls Enigma, Sector-110, Gurugram
2.	Nature of the project	Residential
3.	RERA registered/ not registered.	Registered (351 of 2017) Phase 1
4.	Revised date of completion as per registration certificate	31.08.2018
5.	Apartment/unit no.	F021, 2 nd floor, block F
6.	Apartment measuring	3880 sq. ft.
7.	Payment plan	Construction linked payment plan
8.	Date of execution of flat buyer's agreement	29.02.2012
9.	Total consideration	Rs. 2,37,78,600/- As per statement of account dated 10.08.2018
10.	Total amount paid by the complainant	Rs. 2,30,63,440/-



		As per statement of account dated 10.08.2018
11.	Date of delivery of possession Clause 21 – 3 years plus 6-month grace period from the execution of flat buyer agreement.	29.08.2015
12.	Delay till date	3 years 3 months 22 days
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. The flat buyer's agreement has been executed dated 29.02.2012 in respect of unit no. F021, 2nd floor with respect to super area of 3880 sq. ft. for not handing over possession on due date i.e. 29.08.2015 which is an obligation of the promotor.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The case came up for hearing on 20.12.2018. The reply has been filed by the respondent has been perused.



Facts of the case

6. 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. Pursuant to aforesaid booking of complainant respondent vide allotment letter dated 20.01.2012 allotted flat no. F-021 on 2nd floor in tower F admeasuring 3880 sq. ft. to the complainant and further induced them to sign a pre-printed flat buyer agreement dated 29.02.2012.
7. The complainants submitted that they have paid a total sum of Rs. 2,30,63,440/- towards the aforesaid residential flat in the project from 2011 to 2018 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 2018, 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.



8. 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 flat buyer agreement with a further grace period of six months but he failed to complete the project in time, resulting in extreme kind of mental distress, pain and agony to the complainants.
9. The complainants submitted that 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 it will create an extra burden on the common amenities and facilities.



10. 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.
11. 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.

12. 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. 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.

13. 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 finally on 27.02.2018 refunded the excess amount of Rs. 3,49,200/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,49,200/- which he had illegally withheld for more than two years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax.



14. The complainants submitted that respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. 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.

15. The complainants submitted that 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.

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% p.a., w.e.f 21.08.2015 along-with compensation till the time possession is handed over to the complainants?**
- 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?**

Relief sought:

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

- 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 complainants.**
- ii. **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.**



Respondent's Reply

16. 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 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 complainant 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.
17. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact or 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.

18. The respondent submitted that complainants are falsifying their claim from the very fact that there has been alleged delay in delivery of possession of the booked unit however, that the complainants have filed the instant claim on the alleged delay in delivery of possession of the provisional 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.
19. The respondent submitted that they have already completed the construction of tower F and also obtained OC for the concerned tower and already initiated the process of handing over of possession of tower F 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.



20. The respondent submitted that as per the FBA dated 29.02.2012, 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.

21. 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 issues

22. With respect to **first issue** the respondent is liable to pay interest on the delayed possession. As per clause 21 of the

agreement dated 29.02.2012, 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 29.08.2015 which has already lapsed. Thus, the complainants 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. 29.08.2015 till the offer of possession.

23. In regard to the **second issue** raised by the complainant, as the promoters has failed to fulfil her obligation under section 11, the promoters are liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.

The complainant reserves their right to seek compensation from the promoters for which they shall make separate application to the adjudicating officer, if required.

24. With respect to the **third 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

25. With respect to **issue fourth and fifth** 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 14.12.2018 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.

27. The occupation certificate has been received on 06.04.2018 and the respondent has already offered the possession to the complainant on 08.08.2018. However the respondent has not delivered the unit in time. The complainants are entitled for delayed possession charges at prescribed rate.

Decision and directions of the authority

28. 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.
29. The respondent is directed to pay interest @ 10.75% p.a. on the paid amount to the complainant from the due date of delivery of possession i.e. 29.08.2015 till the offer of possession i.e. 08.08.2018 for the delay occurred in delivery of possession.
30. The arrears of interest so accrued @ 10.75% p.a. from the due date of delivery of possession till the order on the paid amount



of the complainant which comes to be Rs. 82,07,227.50/- shall be paid to the complainant within 90 days from the date of this order.

31. The complaint is disposed of accordingly.

32. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 20.12.2018

Judgement Uploaded on 25.01.2019

HARERA
GURUGRAM



PROCEEDINGS OF THE DAY

Day and Date	Thursday and 20.12.2018
Complaint No.	799/2018 Case titled as Dinesh Arora & Anr. V/S M/S Athena Infrastructure Ltd.
Complainant	Dinesh Arora & 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	
Proceeding Recorded by	Naresh Kumari

Proceedings

Project is registered with the authority.

Arguments heard.

Occupation certificate has been received on 6.4.2018 and the respondent has already offered the possession to the complainant on 8.8.2018.

As per clause 21 of the Builder Buyer Agreement dated 29.2.2012 for unit No.F021, 2nd floor, Block-F, in Indiabulls Enigma" 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 **29.8.2015**. It was a construction linked payment plan. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.2,30,63,440/- to

the respondent. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **29.8.2015 upto 8.8.2018**, as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the handing over the possession failing which the complainant is entitled to refund the amount.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

Complaint is disposed of accordingly. Detailed order will follow.

File be consigned to the registry.

Samir Kumar
(Member)
20.12.2018

Subhash Chander Kush
(Member)
20.12.2018