

PROCEEDINGS OF THE DAY

Day and Date	Friday and 14.12.2018
Complaint No.	659/2018 Case titled as Mr. Rajiv Gupta & Anr. V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Rajiv Gupta & 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	27.9.2018
Proceeding Recorded by	Naresh Kumari & H.R.Mehta

Proceedings

Arguments heard.

Project was registered with the authority but the date of registration of project has expired on 31.8.2018 as per registration certificate. Counsel for the respondent stated that they have applied for extension of registration which is pending with the authority. The re-revised date of delivery of possession is March 2019. Project is badly delayed.

As per clause 21 of the Builder Buyer Agreement dated 31.5.2012 for unit No.B102, 10th floor, Tower-B in project "Indiabulls Enigma, in Sector-110, 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

30.11.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,95,48,578 /- to the respondent.

Complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **30.11.2015** 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 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)
14.12.2018

Subhash Chander Kush
(Member)
14.12.2018

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

Complaint no. : 659 of 2018
First date of hearing: 14.12.2018
Date of decision : 14.12.2018

Mr. Rajiv Gupta and Anr.
R/o. C-1102, Jalvayu Vihar, Powai, Mumbai- **Complainants**
400076

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

ORDER

1. A complaint dated 02.08.2018 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 complainant Mr. Rajiv Gupta and Anr , against the promoter M/s Athena Infrastructure



Ltd.in respect of apartment/unit described below in the project 'India Bulls Enigma', on account of violation of the section 3 of the Act ibid.

2. Since, the buyer's agreement has been executed on 31.05.2012 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	India bulls enigma, Sector-110, Gurgaon
2.	Nature of the project	Residential
3.	RERA registered/ not registered.	Registered(Phase 1)
4.	RERA Registration upto	31.08.2018
5.	RERA Registration no.	351 of 2017
6.	Apartment/unit no.	B102, 10 th floor, tower B
7.	Total area admeasuring	3350 sq.ft.
8.	Payment plan	Construction linked Plan
9.	Date of execution of flat buyer's agreement	31.05.2012



10.	Total consideration as per the as per the receipts attached with the complaint (Annexure-C3), page 84	Rs. 1,99,78,735 /-
11.	Total amount paid by the complainant till date as per the receipts (Annexure- C3)	Rs. 1,95,48,578 /-
12.	Date of delivery of possession Clause 21 - 3 years plus 6 month grace period from the execution of flat buyer agreement.	30.11.2015
13.	Delay till 14.12.2018	3 years 14 days
14.	Penalty clause (clause 22)	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 31.05.2012 is available on record.
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 14.12.2018. The case came up for hearing on 14.12.2018.



Facts of the case

6. Briefly stating the facts of the complaint, the complainants booked a residential flat in the project of the respondent named "Indiabulls Enigma", which is the subject matter of present complaint, is situated at Sector-110, village Pawala-Khusrupur, sub-tehsil Kadipur, district Gurugram, therefore, the hon'ble authority has the jurisdiction to try and decide the present complaint.
7. The respondent had advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality standards and agreed timelines. The respondent while launching and advertising any new housing project always commits and promises to the targeted consumer that their dream home will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling unit to them. They also assured the consumers like complainant that they have secured all the necessary sanctions and approvals from the



appropriate authorities for the construction and completion of the real estate project sold by them to the consumers in general.

8. The complainant while relying on the representations and warranties of the respondent and believing them to be true had agreed to the proposal of the respondent to book the residential flat in the project of respondent.

9. The complainants were further induced to sign a pre-printed flat buyer's agreement 31.05.2012 by virtue of which the respondent allotted unit bearing no. B-2012 on 10th floor in tower- E, having super area of 3,350 sq.ft. Accordingly the complainant had paid Rs. 1,95,48,578/- towards the aforesaid residential flat in the project from October 2012 to April 2016 as and when demanded by the respondent.

10. 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.



11. The respondent has failed to complete the project in time, resulting in extreme 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 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

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. 3,01,500/-.The respondent did not pay any interest to the complainants on the amount of Rs. 3,01,500/- 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 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.

Issues raised by the complainants :

18. The issues raised by the complainant are as follows:

- 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., till the time possession is handed over to the complainant?**
- iii. **Whether the respondent/ promoter has over charged EDCIDC?**
- 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 and PLC?

Relief sought:

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

- i. Award delay interest @ 18% per annum 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

20. 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 complainant who has already filed a complaint before the Ld. Consumer Forum/ Commission and is pending, in such eventuality such complainant will have to withdraw his complaint with permission from the Consumer Forum/Commission to file an application before the



adjudicating officer for adjudication of his dispute, as per the Act.

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. 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*.

22. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. FBA dated 31.05.2012.

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.

23. 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 22** of duly executed FBA, which is at



page 67 of the FBA filed by the complainants along with their complaint.

24. 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.

25. The respondent also submitted that he has already completed the construction of the "tower B" and will be applying for grant of occupation certificate in short span of time for the said tower.

26. 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. Based upon the past experiences the respondent has specifically mentioned all the above contingencies in the FBA dated 05.08.2011 and incorporated them in **Clause 39** of FBA at page 70 annexed with the complaint by the complainants.

27. 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.

28. The respondent submitted that the agreement for the purpose of getting the adjudication of the instant complaint i.e. the flat



buyer agreement dated 31.05.2012 was executed much prior to coming into force of the Act, 2016 and the HA-RERA 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.



29. 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 money that it has received from the buyers 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.



30. 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 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. 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.



Determination of issues

31. In regard to the **first issue** raised by the complainants, the promoters have violated the agreement by not giving the possession on the due date i.e 30.11.2015 as per the

agreement, thus, 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.

32. In respect of the **second issue** raised by the complainants, the authority is of the view that the respondent has delayed the delivery of possession of the booked unit. This is fortified from the fact that as per clause 21 of the agreement dated 30.05.2012, 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 30.11.2015 which has already lapsed and therefore, the respondent is liable to pay interest on the delayed possession. Thus the complainant is entitled for interest on the delayed possession at the prescribed rate of 10.75% p.a. under the Act. Delay charges will accrue from the due date of possession i.e. 30.11.2015 till the offer of possession.

33. In respect of the **third issue** raised in the complaint, the complainant were well aware about the lawful dues to be paid



towards EDC/IDC. As per clause 6(vii) of the flat buyer's agreement, the respondent can charge revised EDC/IDC charges with retrospective effect as imposed by the central or state government or any other authority. Thus, EDC/IDC has been charged as per the terms of the agreement and thus, the issue is decided in negative.

34. In respect of **fourth and fifth issue** raised by the complainant, the respondent has submitted in his reply that the extra floors have no bearing on the amount paid by the complainant and it is denied that the increase in floors/FAR has changed the theme of the project or that it shall disturb the density of the colony. Further, as per clause 18 of the flat buyer's agreement, the floor plans were tentative and were liable to be changed, altered, modified, revised, added, deleted, substituted or recast during the course of the construction and the complainant agreed to the same. Thus, it cannot be said that the respondent has wrongfully resorted to increase in floors/FAR or has artificially inflated measurable super area.



Further, the payments have been collected the respondent as per the payment plan as agreed by the complainant and the complainant has failed to furnish any material particulars in order to prove that he has been wrongfully charged service tax or PLC. Hence, these issues are decided in negative

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 14.12.2018 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.

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 apartment 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 project was registered with the authority but the date of registration of project has expired on 31.08.2018 as per the registration certificate. The counsel for respondent stated that they have applied for extension of registration which is pending with the authority.
40. The authority is of the view that the complainant is entitled for delayed possession charges at prescribed rate of interest till handing over of the possession failing which the complainant is entitled to refund the amount.



Decision and directions of the authority

41. 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 deliver the possession of the apartment in the project in question with all promised amenities to complainants by 31.03.2019 as per the date given in the extension application of RERA registration certificate, failing which the complainants are entitled to seek refund of their paid amount with interest.
- (ii) 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. 30.11.2015 to 14.12.2018 for the delay occurred in delivery of possession.
- (iii) 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. 63,85,021/- shall be paid to the complainants within 90 days from the date of this order.

(iv) Thereafter, the monthly payment of interest i.e. Rs. 1,75,122.69/-/- till handing over of the possession i.e. 31.03.2019, so accrues shall be paid before 10th of subsequent month.

(v) If the possession is not given by the respondent on the committed date i.e. 31.03.2019 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*.

42. The complaint is disposed of accordingly.

43. The order is pronounced.



44. 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: 14.12.2018

Judgement Uploaded on 25.01.2019



HARERA
GURUGRAM

