

**PROCEEDINGS OF THE DAY**

Day and Date	Wednesday and 23.01.2019
Complaint No.	591/2018 Case Titled As Mr. Rakesh Verma & Anr V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Rakesh Verma & Anr
Represented through	Shri Vaibhav Suri, Advocate for the complainant.
Respondent	M/S Athena Infrastructure Ltd
Respondent Represented through	Shri Ashish Kumar, authorized representative on behalf of the respondent company with Shri Rahul Yadav, Advocate
Last date of hearing	12.12.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

**Proceedings****Project is registered with the authority.**

Arguments heard.

As per clause 21 of the Builder Buyer Agreement dated 23.4.2012 for unit No.A032, 3rd floor, tower-A, in project "Indiabulls Enigma" 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 23.10.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,89,78,798/- to the respondent against a total sale consideration of Rs. 1,93,30,000/-. The respondent has already offered the possession to the complainant on 3.7.2018. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e.

New PWD Rest House, Civil Lines, Gurugram, Haryana नया पी.डब्ल्यू.डी. विश्राम गृह सिविल लाईंस गुरुग्राम हरियाणा

10.75% per annum w.e.f 23.10.2015 to 3.7.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.

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

Samir Kumar  
(Member)  
23.1.2019

Subhash Chander Kush  
(Member)

**BEFORE THE HARYANA REAL ESTATE REGULATORY**

**AUTHORITY, GURUGRAM**

**Complaint no. : 591 of 2018**

**First date of hearing : 20.09.2018**

**Date of decision : 23.01.2019**

Mr. Rakesh Verma & another  
R/o Raja Enterprises, Varun Complex,  
Rampur road, Haldnani  
Uttarakhand- 263139.

**..Complainants**

Versus

M/s. Athena Infrastructure Ltd.  
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 Advocate for the complainant  
Shri Ashish Kumar authorised Advocate for the respondent  
representative on behalf of  
respondent company with Shri  
Rahul Yadav



**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 complainants Mr. Rakesh Verma & another against the promoter M/s Athena Infrastructure Ltd. on account of violation of the clause 20 of the flat buyer's agreement executed on 23.04.2012 in respect of flat described below in the project 'Indiabulls Enigma' for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer's agreement has been executed on 23.04.2012, 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 are as under: -

**i. Nature of the project- Residential**

- ii. DTCP license no: 213 of 2007 dated 05.09.2007, 10 of 2011 dated 29.01.2011 and 64 of 2012 dated 20.06.2012**



1.	Name and location of the project	India bulls Enigma Sector 110, Gurugram
2.	Registered/Unregistered	<b>Registered</b> <b>(346 of 2017)</b>
3.	Revised date of completion as per RERA registration certificate	<b>31.08.2018</b> <b>Note: This has already expired.</b>
4.	Payment plan	Construction linked
5.	Date of agreement	23.04.2012
6.	Unit no.	A032, 3 <sup>rd</sup> floor, tower A
7.	Area of unit	3400 sq. ft.
8.	Total consideration as per applicant ledger dated 20.06.2018	Rs. 1,93,30,000/-
9.	Total amount paid by the complainant as per applicant ledger dated 20.06.2018	Rs. 1,89,78,798/-
10.	Possession Clause 21 – 3 years plus 6 months grace period from the execution of flat buyers agreement	23.10.2015
11.	Penalty As per clause 22	Rs. 5/- per sq. ft. per month of the super area
12.	Delay till date	Approximately 3 years 1 month 15 days
13.	Offer of possession	03.07.2018



4. Details provided above have been checked on the basis of record available in the case file which has 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 23.10.2015. Neither the respondent has delivered the possession of the said unit till date to the complainant nor they have paid any compensation @ Rs.5/- per sq. ft. per month for the period of delay as per clause 22 of flat buyer's agreement dated 23.04.2012. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on 12.12.2018. The case came up for hearing on 12.12.2018. The reply filed on behalf of the respondent on has been perused.



**FACTS OF THE CASE:**

6. The complainants booked a residential flat in the project of the respondent namely "India bulls Enigma" at Sector 110,

Gurugram in Pawala Khusrupur Village, Gurgaon Tehsil,  
Gurugram.

7. That the representatives of India bulls Real Estate Ltd. represented to the complainants that India bulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd.
8. That the complainants were induced to sign a pre-printed flat buyers agreement dated 23.04.2014. The respondent allotted flat bearing no. A-032 on 3<sup>rd</sup> floor in tower no. A, admeasuring super area of 3400 sq. ft. to the complainants.
9. That the complainants have paid a total sum of Rs. 1,89,78,798/- towards the aforesaid residential flat in the project from 2011 to 2014 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 2014, which is also in terms with the construction linked payment plan, however still the respondent/ promoter miserably failed to offer the possession of the flat in question till date despite delay of more than three years



10. That the respondent had promised to complete the project within a period of 36 months from the date of execution of the flat buyers agreement with a further grace period of six months. The flat buyer's agreement was executed on 23.04.2012 and till date the construction is not complete

11. That the project India bulls Enigma comprises of towers A to J. The tower D is to be developed by another subsidiary of India bulls 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.

12. 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 complainants. 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.

13. The 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's advertisement material displayed at site as well as on the internet.

14. 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.

15. 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/ promoter finally on 22.08.2016 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.

16. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 23.04.2012 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.

17. That the respondent for a long time did not provide the complainants with status of the project. It is pertinent to mention that on 03.07.2018 the complainants received a letter from the respondent, wherein it is mentioned that the respondent has received occupation certificate for tower- 'A' from Director General, Town and Country Planning Department 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.



**ISSUES RAISED BY THE COMPLAINANTS:**

18. The following issues have been raised by the complainants:

- 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. along-with compensation till the time possession is handed over to the complainants?
- iii. Whether the respondent 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 BY THE COMPLAINANTS:**

19. In view of the facts mentioned the following reliefs have been sought by the complainants:
  - 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 to rectify the breaches with regard to extra EDC /IDC charges, VAT, service tax as well as for wrongfully inflating the super area.
  - iii. Direct the respondent to pay a sum of Rs. 50 lacs to the complainants as compensation for making misrepresentations and giving false and incorrect statement at the time of booking
  - iv. Direct the respondent to pay a sum of Rs. 50,000/- to the complainants towards the cost of the litigation;
  - v. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.



**REPLY BY THE RESPONDENT:**

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 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 have 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

21. 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.

22. 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, 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.

23. The respondent submitted that they have already completed the construction of tower A and also obtained OC for the concerned tower and 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.

24. The respondent submitted that as per the flat buyers agreement dated 23.04.2012, 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 flat buyers agreement being referred to or looked into in this proceeding is an agreement executed much before the commencement of the Act.

25. 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 favour of the complainants to institute the present complaint.

#### DETERMINATION OF ISSUES:

26. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise

- i. With respect to the **first and second issue** raised by the complainants, the authority came across that as per clause 21 of the flat buyer's agreement; the possession of the said apartment was to be handed over within 3 years plus grace period of 6 months from the date of execution





of apartment buyer's agreement. The agreement was executed on 23.04.2012. Therefore, the due date of possession shall be computed from 23.04.2012. The clause regarding the possession of the said unit is reproduced below:

*"Clause 21: The developer shall endeavour to complete the construction of the said building within a period of three years, with a six months grace period from the date of execution of flat buyers agreement subject to timely payment.."*

Accordingly, the due date of possession was 23.10.2015 and the possession has been delayed by approximately 3 years 01 month 15 days till date. 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. 23.10.2015 till the offer of possession.

Further, the respondent has admitted in para 8 of the reply submitted by him, that the construction of the said tower is complete and has also obtained an occupation certificate for the same and has already initiated the procedure of handing over possession of the units of the said tower.



- ii. With respect to **issue no 3**, raised in the complaint, the complainants 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.
- iii. In respect of **fourth and fifth issue** raised by the complainants, the respondent has submitted in his reply that the extra floors have no bearing on the amount paid by the complainants 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 complainants and the complainants have 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:**

27. **Jurisdiction of the authority-** The project “Indiabulls Enigma” is located in Sector-110, Village Pawala Khusrupur, District Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The authority has complete 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 complainant at a later stage.

28. The complainants made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter.

29. The complainants requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions and fulfil obligation.

30. As per clause 21 of the builder buyer agreement dated 23.04.2012 for unit no A 032, 3<sup>rd</sup> floor, tower -A in project Indiabulls Enigma, 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 23.10.2015. however, the respondent has not delivered the unit in time.

Complainant has already paid Rs 1,89,78,798/- to the respondent against a total sale consideration of Rs 1,93,30,000/-. The respondent has already offered the



possession to the complainant on 03.07.2018. as such complainant is entitled for delayed possession charges as prescribed rate i.e. 10.75% per annum.

**DECISION AND DIRECTIONS OF THE AUTHORITY:**

31. After taking into consideration all the material facts adduced 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:

- a. The respondent is directed to pay the interest at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainants.
- b. The respondent is directed to pay interest accrued from 23.06.2015 to 03.07.2018 on account of delay in handing over of possession to the complainant within 90 days from the date of order.



c. The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.

32. The order is pronounced.

33. Case file be consigned to the registry.

**(Samir Kumar)**

Member

Date: 23.01.2019

**(Subhash Chander Kush)**

Member

\*Judgement uploaded on 30.01.2019

HARERA  
GURUGRAM

