

PROCEEDINGS OF THE DAY	
Day and Date	Thursday and 31.01.2019
Complaint No.	1481/2018 Case Titled As Vijay Bhargava & Ors. V/S M/S Athena Infrastructure Ltd
Complainant	Vijay Bhargava & Ors.
Represented through	Shri Siddharth Aggarwal Advocate for the complainant
Respondent	M/S Athena Infrastructure Ltd
Respondent Represented through	Shri Rahul Yadav Advocate for the respondent.
Last date of hearing	First hearing
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation & Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

Arguments heard.

As per clause 21 of the Builder Buyer Agreement dated 23.7.2012 for unit No.F 042, 4th floor, tower-F, in project "Indiabulls Enigma" Sector 110, Gurugram, possession was to be handed over to the complainant within a period of 3 years from the date of execution of BBA + 6 months grace period which comes out to be 23.1.2016. However, the respondent has not delivered



HARERA
GURUGRAM

HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

हरियाणा भू-संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

the unit in time. Complainant has already paid Rs.1,58,65,104/- to the respondent against a total sale consideration of Rs.1,69,39,437/-.

Respondent has already offered the possession of the unit to the complainant on 18.7.2018, as such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 23.1.2016 till 18.7.2018 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.

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

Samir Kumar
(Member)
31.1.2019

Subhash Chander Kush
(Member)

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

**Complaint no. : 1481 of
2018**
First date of hearing 31.01.2019
Date of decision : 31.01.2019

1. Sh. Vijay Bhargava
2. Sh. Div Bhargava
R/o B-5/138, Safdarjung Enclave,
New Delhi: 110029
Versus

..Complainants

M/s. Athena Infrastructure Ltd
R/o M-62 & 63 First Floor, Connaught
Place,
New Delhi-110001

...Respondent

CORAM:

Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

APPEARANCE:

Shri Siddharth Aggarwal Advocate for the complainants
Shri Rahul Yadav Advocate for the respondent

ORDER

1. A complaint dated 26.10.2018 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. Vijay Bhargava and Div Bhargava against the promoter M/s. Athena Infrastructure Ltd. on account of violation of the clause 21 of the flat buyer agreement executed on 23.07.2012 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 agreement has been executed on 23.07.2012, 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.	Project area	15.6 acres
3.	Registered/Unregistered	Registered (346 of 2017)
4.	Revised date of completion as per RERA registration certificate	31.08.2018 Note: This has already expired.
5.	Payment plan	Construction linked plan
6.	Date of agreement	23.07.2012
7.	Unit no.	F042, 4 th floor, tower F
8.	Area of unit	3830 sq. ft.
9.	Total consideration as per offer of possession as per letter dated 18.07.2018	Rs 1,69,39,437/-
10.	Total amount paid by the complainant dated 18.07.2018	Rs. 1,58,65,104/-
11.	Possession Clause 21 - 3 years plus 6 months grace period from the execution of flat buyer agreement	23.01.2016
12.	Penalty as per clause 22	Rs 5/- per sq. ft. of the super area
13.	Delay till offer of possession	2 years 5 months 25 days
14.	Offer of possession	18.07.2018
15.	Occupation certificate	06.04.2018



4. Details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A flat buyer agreement is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 23.01.2016. Neither the respondent has delivered the possession of the said unit till date to the complainants 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 agreement dated 23.07.2012. 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 31.01.2019. The case came up for hearing on 31.01.2019. The reply filed on behalf of the respondent on has been perused.



FACTS OF THE CASE:

6. That 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.

7. That the representatives of Indiabulls Real Estate Ltd. represented to the complainants that Indiabulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd. The complainants 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 stated that the Indiabulls Enigma is a premium high-end multi-storey project being developed with the assistance of internationally renowned architects. It was also represented that all necessary sanctions and approvals had been obtained to complete the same within the promised time frame.



8. That the complainants were induced by the assurances and promises made by the respondent/promoter and accordingly the complainants booked a flat with the respondent in the project in question, subsequent to which the complainants were induced to sign a pre-printed flat buyer agreement dated 23.07.2012. The respondent/ promoter by way of

aforesaid flat buyer agreement allotted flat bearing No. F-042 on 4th floor in tower No. F, admeasuring super area of 3830 sq. ft. to the complainants.

9. The complainants have paid the entire sale consideration to the respondent/promoter i.e. Rs. 1,69,39,437/- The said payment was made towards the demands raised by the respondent at different point in time. The complainants on receipt of final demand notice/ statement of account paid the remaining sale consideration of Rs. 10,56,734/- to the respondent/promoter vide cheque bearing No. "277691" drawn on Indian Overseas Bank.

10. 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. The flat buyer agreement was executed on 23.07.2012 and was under an obligation to handover the possession by 23.01.2016 however till date the construction is not complete. Furthermore the respondent/ promoter had collected more than 95% of the sale consideration within three years of the booking and as such the gross delay in



completion of the project is solely attributable to the respondent/ promoter.

11. That the respondent has failed to complete the project in time, resulting in extreme mental distress, pain and agony to the complainants.

12. That the project Indiabulls Enigma comprises of towers A to J.

The towers i.e. A to C and E to J are being developed by subsidiary of Indiabulls namely Athena Infrastructure

Limited, whereas tower D is being constructed by another 100% subsidiary of Indiabulls namely Varali Properties Ltd.

It was presented to the complainants that towers A to D will have 17 floors. However, during the construction the

respondent and Athena 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 will 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.



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 advertisement material displayed at site as well as on the internet.
14. 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.

15. That the complainants have made visits at the site and observed that there are serious quality issues with respect to the flat offered by the respondent. 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 sold the project stating that it will be next landmark in luxury housing and will redefine the

meaning of luxury but the respondent has converted the project into a concrete jungle. There are no visible signs of alleged luxuries.

17. That the respondent has illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. It is pertinent to mention that 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 19.09.2017 refunded the excess amount of Rs. 3,44,700/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,44,700/- which the respondent had illegally withheld for more than three years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax. It is pertinent to mention that the respondent at the time of raising the final demand has also charged an exorbitant amount of Rs. 5,42,328/- towards electrification charges which includes installation of electric meter and energization



charges. It is most humbly submitted that the respondent/promoter has nowhere in the builder buyer agreement dated 23.07.2012 executed with the complainants has disclosed the electric charges and thus the act of charging such an exorbitant amount of mere electricity meter installation amounts to unfair trade practice.

18. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 23.07.2012 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.



19. That the complainants are entitled for interest @ 18% p.a. for every month of delay till the possession of the apartment is handed over to the complainants, complete in all respects. The original date of possession ought to be counted on expiry of three years from date of first payment. It is pertinent to

mention that the flat offered for possession vide demand notice dated 18.07.2018 is of extremely poor quality with shoddy patch work all over the apartment, so much so that even the walls of the apartment are not properly aligned.

ISSUES RAISED BY THE COMPLAINANTS:

20. 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 complainant?
- 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:

21. 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 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.
- iii. Direct the respondents to pay a sum of Rs. 50,000/- to the complainant towards the cost of the litigation;
- iv. 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:

22. 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

23. 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.



24. 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.

25. The respondent submitted that it has 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 it is under the process of handing over of possession of the unit of the said tower including the unit of the complainants in question.



26. The respondent submitted that the agreement dated 23.04.2012 has been 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 agreement being referred to or looked into in this proceeding is an agreement executed much before the commencement of the 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 agreement. 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:



28. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings are as follows:

- i. With respect to the **first and second issue** raised by the complainants, the authority came across that as per clause 21 of the apartment buyer 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 agreement. The agreement was executed on 23.07.2012. Therefore, the due date of possession shall be computed from 23.07.2012. 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 23.01.2016 and the possession has been delayed by approximately 2 years 5 month 25 days till date. 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. 23.01.2016 till the offer of possession. i.e. 18.07.2018



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 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:

29. **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 complainants at a later stage.

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

31. The complainant 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.

32. As per clause 21 of the flat buyer agreement dated 23.07.2012 for unit no F 042, 4th floor, tower F in the project Indiabulls Enigma, sector 110, Gurugram, possession was to be handed over to the complainant within a period of 3 years from the date of execution of the builder buyer agreement+ grace period of 6 months which comes out to be 23.01.2016. However, the respondent has not delivered the unit in time.



Complainant has already paid Rs. 1,58,65,104/- to the respondent against a total sale consideration of Rs. 1,69,39,437/-. Respondent has already offered the possession of the unit to the complainant on 18.07.2018.

DECISION AND DIRECTIONS OF THE AUTHORITY:

33. 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 23.01.2016 to 18.07.2018 on account of delay in handing over of possession to the complainants within 90 days from the date of order.



c. Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid on or before 10th of subsequent month.

34. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.

35. The order is pronounced.

36. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member



Date: 31.01.2019

Judgement Uploaded on 08.02.2019