

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 23.01.2019
Complaint No.	594/2018 Case Titled As Mrs. Abeda Khan V/S M/S Athena Infrastructure Ltd.
Complainant	Mrs. Abeda Khan
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.

Conveyance deed has been executed inter-se the parties and possession has already been offered to the complainant on 3.7.2018.

As per clause 21 of the Builder Buyer Agreement dated 30.9.2012 for unit No.A083, 8th floor, tower-A, in project "Indiabulls Enigma" Sector-110, 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 30.3.2016. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,37,32,718/- 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 30.3.2016 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.

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. : 594 of 2018
First date of hearing: 20.09.2018
Date of Decision : 23.01.2019

Mrs. Abeda Khan
H.no. A-414, LGF, Defence Colony,
New Delhi-110024

Complainant

Versus

M/s Athena Infrastructure Ltd.
Regd. Office: M-62 & 63, first floor,
Connaught Place, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vaibhav Suri Advocate for complainant
Shri Rahul Yadav Advocate for the respondent
Shri Ashish Kumar Authorized representative on
behalf of the respondent
company

ORDER

1. A complaint dated 24.07.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and



Development) Rules, 2017 by the complainant Mrs. Abeda Khan against the promoter M/s Athena Infrastructure Pvt. Ltd. on account of violation of the clause 21 of the flat buyer's agreement executed on 30.09.2012 in respect of flat/no. A083, 8nd floor, block/tower A, admeasuring 3,400 sq. ft. super area, in the project 'Indiabulls Enigma' for not handing over possession on the due date i.e. 30.03.2016 which is an obligation under section 11(4)(a) of the Act ibid.

2. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Indiabulls Enigma", Sector 110, Gurugram
2.	Nature of real estate project	Residential complex
3.	DTCP license no.	213 of 2007, 10 of 2011 and 64 of 2012
4.	Apartment/unit no.	A083, on 8 nd floor, block/tower 'A'
5.	Apartment measuring	3,400 sq. ft. super area
6.	RERA registered/ unregistered.	Registered vide no. 351 of 2017
7.	Occupation certificate	OC has been received but not annexed
8.	Conveyance deed executed and possession taken on	05.12.2018
9.	Possession letter offer dated	03.07.2018
10.	Booking date	26.01.2012
11.	Date of execution of builder buyer's agreement	30.09.2012
12.	Payment plan	Construction linked payment plan
13.	Basic sale price	Rs.1,21,59,998 /-
14.	Total sale consideration	Rs. 1,38,72,998/-



15.	Total amount paid by the complainant as per SOA	Rs.1,37,32,718/-
16.	Due date of delivery of possession as per clause 21 of builder buyer's agreement dated 30.09.2012 (3 years + 6 months' grace period from the date of execution of agreement)	30.03.2016
17.	Delay in handing over possession till 03.07.2018	2 years 3 months and 3 days
18.	Penalty clause as per flat buyer's agreement dated 30.09.2012	Clause 22 of the agreement i.e. Rs.5/- per sq. ft per month of the super area.
19.	Revised date of delivery of possession as per RERA certificate	31.08.2018 but extension is not required as OC has been received in respect of tower A

3. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. A flat buyer's agreement dated 30.09.2012 is available on record for the aforesaid flat no. A083, 8th floor in tower A of the project, according to which the possession of the same was to be delivered by 30.03.2016. Neither the respondent has delivered the possession of the said unit till now to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft. per month of the super area of the said flat for the period of such delay as



per clause 22 of builder buyer's agreement dated 30.09.2012. Therefore, the promoter has not fulfilled his committed liability till date.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent's counsel appeared 20.09.2018. The case came up for hearing on 20.09.2018, 12.12.2018 and 23.01.2019. The reply filed by the respondent has been perused.

Facts of the complaint

5. Briefly stated, the facts relevant for the disposal of the present complaint are that on 26.01.2012, complainant booked a residential flat in the project of the respondent namely, "Indiabulls Enigma" at Sector-110, Gurugram. The representatives of Indiabulls Real Estate Ltd. represented to the complainant that Indiabulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd. It was also represented that all necessary sanctions and approvals had been obtained to complete same within the promised time frame.



6. The complainant submitted that pursuant to the aforesaid booking of the flat, respondent vide allotment letter dated 30.09.2012 allotted apartment/flat no. A083, 8nd floor in tower A of the project in favour of the complainant. A flat buyer's agreement undated simultaneously was executed between the parties.
7. The complainant has paid a total sum of Rs. 1,37,32,718/- towards the aforesaid residential flat in the project from May, 2012 to October, 2014 as when demanded by the respondent.
8. The complainant alleged that the respondent had promised to complete the project within a period of 3 years from the date of execution of the flat buyer's agreement dated 30.09.2012 with a further grace period of 6 months. The builder buyer's agreement was executed but till date construction is not complete. This has caused the complainant mental distress, pain and agony. The project "Indiabulls Enigma" comprises of towers A to J. 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 the respondent. It was presented to the complainant that towers



A to D will have 17 floors but the respondent and Varali changed the original plan without taking the consent of the allottee and increased 4 floors in towers A to D, it changed the theme of the project and therefore, will create extra burden on the common amenities and facilities.

9. The complainant stated that she has made visits at the site and observed that there was serious quality issues with respect to the construction carried out by respondents till now. The flats were sold by representing that the same luxurious apartment however, all such representations seem to have been made in order to lure the complainant to purchase the flat at extremely high prices. The respondent has compromised with levels of quality and are guilty of mis-selling. The respondent has illegally charged car parking usage charges. The respondent also over charged EDC and IDC and has misrepresentation regarding the claim of VAT. Respondent has also wrongfully charged PLC and Service tax. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of possession.



10. Issues to be decided:

- i. Whether the respondent made false representations about the project in question in order to induce the complainant to make a booking?
- ii. Whether the respondent delayed in handing over the possession of the project?
- iii. Whether the respondent is liable to pay the delay interest @18% p.a. till possession is handed over to the complainants?
- iv. Whether the respondent has over charged EDC/ IDC?
- v. Whether the respondent has wrongfully resorted to increase in floors thereby changing the entire theme of the project?
- vi. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax and PLC?



11. Relief sought:

The complainant is seeking the following relief:

- i. Award delay interest @ 18% p.a. for every month of delay, till the handing over of possession.
- ii. Direct the respondent to provide the schedule of construction and also to rectify the breached with regard to extra EDC/IDC charges, wrongfully charging of parking, VAT, service tax, PLC as well as wrongly inflating the super area.
- iii. Direct the respondent to pay a sum of Rs. 50,000/- to the complainant towards the cost of litigation.

Respondent's reply:

12. 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.

13. The allegations made in the instant complaint are wrong, incorrect and baseless in the fact or law. The respondent denies them in toto. As per the builder buyer's agreement duly executed between the parties, it was specially agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement, clause 49 at page 69 of builder buyer agreement it has been mentioned that the dispute shall first go for arbitration.

14. The respondent contended that the complainant is falsifying their claim from the very fact that there has been alleged delay in delivery of possession of the booked unit however, the complainant with malafide intention hide the fact from this hon'ble authority that she, on many occasions were the defaulter in making the payment of installments. The complainant after being satisfied in totality expressed her 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 transferred her name from the initial owner. The respondent has already completed the construction of the tower H and have also applied for the grant of occupational certificate before the concerned authority. The delay in delivering the possession was beyond the control of the respondent since number of approvals have to be taken from various authorities. In addition the problem related to labor/raw material and government restrictions including the National Green Tribunal which imposed ban on the construction in Delhi- NCR for several months, the respondent kept on the work moving steadily. The complainant has made false and baseless allegations with a mischievous intention.

Determination of issues:

15. After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:
16. In respect of the **first issue** raised by the complainants, the complainant has failed to furnish any concrete proof in order



to prove any false representation the part of respondent in order to induce the complainants to make a booking.

17. In respect of the **second and third issue** raised by the complainant, 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 30.09.2012, the construction was to be completed within a period of 3 years with a grace period of six months from the date of execution of the agreement. The due date of possession comes out to be 30.03.2016 which has already lapsed but the possession has not been delivered till date and therefore, the respondent is liable to pay interest on the delayed possession. Thus, the complainants are 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. 30.03.2016 till 03.07.2018. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the carpet area of the said flat as per clause 22 of flat buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted



mischievously by the respondent and are completely one sided as also held in para **181 of Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors.** (W.P 2737 of 2017), wherein the Bombay HC bench held that:

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

18. As the possession of the flat was to be delivered by 30.03.2016 as per the clause referred above, 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. Hence, the respondent is liable to pay interest to the complainant, at the prescribed rate for every month of delay till the handing over of possession.

The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.



19. In respect of the **fourth issue** raised in the complaint, the complainant was 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.
20. In respect of **fifth and sixth 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 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

21. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *SimmiSikka 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.

22. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and 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.

23. 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.

24. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court - in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by



the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

25. Conveyance deed has been executed inter-se the parties and possession has already been offered to the complainant on 03.07.2018.

26. As per clause 21 of the builder buyer's agreement dated 30.9.2012 for unit no. A083, 8th floor, tower-A, in project "Indiabulls Enigma" Sector-110, 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 30.3.2016. However, the respondent has not delivered the unit in time.

27. Complainant has already paid Rs.1,37,32,718/- 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 30.03.2016 to 03.07.2018, as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.



Decision and directions of the authority

28. After taking into consideration all the material facts as adduced and produced 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 to the respondent in the interest of justice and fair play:

- (i) The respondent is duty bound to pay the interest at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession w.e.f 30.03.2016 to 03.07.2018.
- (ii) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

29. The order is pronounced.

30. Case file be consigned to the registry.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 23.01.2019

Judgement Uploaded on 08.02.2019