

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 31.01.2019
Complaint No.	1503/2018 Case Titled As Capt Akhil Mittal And Anr V/S M/S Athena Infrastructure Ltd
Complainant	Capt Akhil Mittal And Anr
Represented through	Shri Siddharth Aggarwal Advocate for the complainant.
Respondent	M/S Athena Infrastructure Ltd
Respondent Represented through	Shri Rahul Yadav Advocate for respondent.
Last date of hearing	First hearing
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 2.4.2012 for unit No.C-044, admeasuring 2570.67 square feet in project "Indiabulls Enigma" Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of BBA + 6 months grace period which comes out to be 2.10.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,93,37,196/- to the respondent against a total sale consideration of Rs.1,99,78,750/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 2.10.2015 as per the provisions

of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.

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 offer of possession shall be paid before 10th of subsequent month.

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)
31.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 1503 of 2018
First date of hearing: 31.1.2019
Date of decision : 31.1.2019

Capt. Akhil Mittal and Shruti Mittal
R/o: B-805, Media Society,
Plot no. 18A , Dwarka, Delhi

Complainants

Versus

M/s Athena Infrastructures Ltd.
Address: M-62 and 63, 1st floor,
Connaught Place, New Delhi-110001

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
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 Capt. Akhil Mittal and Shruti Mittal against M/s. Athena Infrastructures



Ltd., on account of violation of the clause 21 of buyer's agreement executed on 2.4.2012 in respect of unit described as below for not handing over possession on the due date i.e. 2.10.2015 which is an obligation under section 11(4)(a) of the Act *ibid*.

2. Since, the buyer's agreement has been executed on 2.4.2012 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	"INDIABULLS ENIGMA", Pawala Khusrupur Village, Gurugram, Haryana.
2.	RERA registered/ not registered	Registered
3.	RERA registration number	351 of 2017
4.	Unit no.	C-044, 4 th floor, tower-C
5.	Unit measuring	3350 sq. ft'
6.	Buyer's agreement executed on	2.4.2012
7.	Total amount as per statement of buyer's agreement	Rs.1,99,78,750/- (Annexure-4, page no.98)
8.	Total amount paid by the complainants till date	Rs.1,93,37,196/- (Annexure-4, page no.99)
9.	Percentage of consideration amount	96.78%
10.	Payment plan	Construction link plan



11.	Date of delivery of possession (36 months from the date of execution of the agreement + 6 months grace period) clause 21	2.10.2015
12.	Delay in handing over possession till date	3 years 3 months 29 days (aapprox.)
13.	Penalty clause as per buyer's agreement dated 2.4.2012	Clause 22 of the agreement i.e. Rs.5/- per sq. ft' of the super area. per month.

4. The 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 buyer's agreement is available on record for the aforesaid unit. The possession of the said unit was to be delivered by 2.10.2015 as per the said agreement. 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 for appearance.

Brief facts of the complaint

6. The complainants booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurugram in Pawala Khusrupur Village, Gurugram Tehsil, Gurugram ("**the Project**").
7. The representatives of Indiabulls Real Estate Ltd. represented to the complainants that Indiabulls is developing



the above project through its 100% subsidiary M/s Athena Infrastructure Ltd. and Varali Properties Limited. 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. 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. The complainants were induced to sign a pre-printed application form dated 27.12.2011. The respondent/ promoter by way of aforesaid application form allotted flat no. C-044 on 4th floor in tower -C, admeasuring super area of 3350 sq. ft' to the complainants.

9. The respondent did not execute the builder buyer agreement with the complainants and kept on delaying the same on pretext or the other. The respondent finally on 2.4.2012 executed a pre-printed BBA with the complainants and



confirmed the allotment of allotted flat no. C-044 on 4th floor in tower – C, admeasuring super area of 3350 sq. ft' to the complainants. It is pertinent to mention that the application form of the respondent itself stated that the agreement would be executed within thirty days.

10. The complainants have paid a total sum of Rs. 1,93,37,196/- towards the aforesaid residential flat in the project from December, 2011 to August, 2012 as and when demanded by the respondent. It is pertinent to mention that the complainants had made more 95% payments to the respondents by year 2012.
11. The respondent had promised to complete the project within a period of 36 months from the date of execution of the agreement with a further grace period of six months. The flat buyer's agreement was executed on 2.4.2012 and 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.
12. The respondent has failed to complete the project in time, resulting in extreme mental distress, pain and agony to the



complainants. The respondent has deliberately delayed the execution of the agreement as it is only the agreement which contains the possession delivery clause and also the compensation clause and hence to safeguard itself from the liabilities and future litigation, the respondent delayed the execution of agreement.

13. The project Indiabulls Enigma comprises of towers A to J. The tower D is to be developed by Varali Properties Ltd. The other towers i.e. A to C and E to J are being developed by the respondent herein. It was presented to the complainants that towers A to D will have 17 floors. However, during the construction the respondent changed the original plan and revised the same to the detriment of the complainants and unilaterally increased 4 floors in towers A to D. The increase in floors/increase in FAR changed the entire theme of the project which shall ultimately disturb the density of the colony and its basic design attraction and it will create an extra burden on the common amenities and facilities.

14. 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.

15. 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.
16. 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.



17. 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 misrepresenting. 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.

18. The respondent has illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of HVAT. 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 14.9.2016 refunded the excess amount of



Rs. 2,86,425/- . The respondent did not pay any interest to the complainants on the amount of Rs. 2,86,425/- 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.

19. The issues raised by the complainants are as follows:

- i. Whether there is delay in construction and development of the apartment and whether the respondent is liable to pay the delay interest @18% p.a., till the handing over of possession?
- ii. Whether there has been misrepresentation on the part of the developers about the project in question?
- 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?



20. Relief sought

The complainants are seeking the following reliefs:

- i. Direct the respondent to award interest @18% p.a. for every month of delay, till the handing over of possession of the apartment.
- ii. Direct the respondent to provide schedule of construction and also rectify the breaches with regard to extra EDC/IDC charges, wrongfully charging of packing charges, HVAT, service tax as well as wrongfully inflating the super area.
- iii. Direct the respondents to pay a sum of Rs.50,000 to the complainant towards the cost of litigation.
- iv. Pass any such order which this authority may deem fit and proper.

Respondent's reply

21. The complainant has filed the present complaint under wrong provision of RERA Act, 2016 before this hon'ble authority. However the compensation as sought in their complaint has to be adjudicated by the adjudicating officer as per the provisions as mentioned in the RERA Act 2016 & rules 2017. Hence the instant complaint is liable to be dismissed on this ground alone.



22. The present complaint is not maintainable before the hon'ble authority and also devoid of any merits, which has been preferred with the sole motive to harass the respondent. 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 customer/ complainant who has already filed a complaint before the Ld. consumer forum/ commission(s) and is pending, in such eventuality such customer(s)/ complainant(s) will have to first withdraw their complaint with permission from the Ld. consumer forum(s)/ commission(s) in order to file an application before the adjudicating officer for adjudication of his dispute, as per the Act.

23. It is respectfully submitted that the relationship between the complainant and the respondent is governed by the document executed between them i.e. buyer's agreement dated 2.4.2012. 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 has not disclosed,



infact concealed the material fact from this hon'ble authority that the complainants have not been complying in terms of the flat buyer agreement executed between the complainants and the respondent. 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.

24. 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 agreement 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 agreement. It is thus prayed, that the complainants being aware, having knowledge and having given consent to the incorporation of clause 22, are now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay.

25. It is only after being satisfied with the project in totality that the complainants expressed their 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.



26. The respondent has already completed 95% construction of the "tower C". It is submitted that the delay in delivering the possession of the flat to the complainants was 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.

27. It is further submitted that, 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. It is pertinent to mention herein that the agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 2.4.2012 was executed much prior to coming into force of the



RERA 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 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 monies that it has received from the buyers / customers 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 in comparison to other real estate developers / promoters who have started the project around similar time period and have abandoned the project due to such reasons.

Determination of issues

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

30. With respect to the **first issue**, the authority came across that as per clause 21 of buyer’s agreement dated 2.4.2012. The clause regarding the possession of the said unit is reproduced below:

“21 Possession

The company shall endeavour to complete the construction of the said building/apartment within a period of 3 years with a six months grace period from the date of execution of the apartment buyers agreement.”



Accordingly, the due date of possession was 2.10.2015 and the possession has been delayed by 3 years 3 months 29 days till now. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the super area of the unit for the period of delay as per clause 22 of 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."

31. The prayer of the complainant regarding payment of interest at the prescribed rate for every month of delay, till handing over of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per provisions of section 16(a)(1) is hereby allowed. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and



Development) Act, 2016 to the respondent to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainants with the promoter on the due date of possession i.e. 2.10.2015 till this day.

32. With respect to the **second issue**, the complainant has made allegations without substantiating them in material particulars. As such, this issue cannot be determined.
33. With respect to the **third 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.
34. With respect to the **fourth issue**, the respondent has attached the revised building plans as annexure-2 with their reply as per which the revised plans have been approved by DTCP vide letter dated 23.8.2013. As per clause 18 of the buyer's agreement dated 2.4.2012, 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. Notifications were published with regard to change in plans by the respondent company in



leading newspapers namely 'The Tribune', 'Hindustan Times' and 'Dainik Jagran' (Annexure-1). However, no objections were received from any allottee in respect of amendments in building plans.

Findings of the authority

35. **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.



36. As per clause 21 of the builder buyer agreement dated 2.4.2012 for unit No.C-044, admeasuring 2570.67 square feet in project “Indiabulls Enigma” Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of BBA + 6 months grace period which comes out to be 2.10.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,93,37,196/- to the respondent against a total sale consideration of Rs.1,99,78,750/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest.

Decision and directions of the authority

37. 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 respondents:

- (i) The respondent is directed to pay delayed possession charges to the complainants at the prescribed rate of interest i.e. 10.75% per annum w.e.f 2.10.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.



(ii) 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 offer of possession shall be paid before 10th of subsequent month.

(iii) The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainants, if any.

38. Complaint stands disposed of.
39. The order is pronounced.
40. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.1.2019

Judgement Uploaded on 13.02.2019

