

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 23.01.2019
Complaint No.	589/2018 Case Titled As Cdr Praveen Sharma & Anr V/S M/S Athena Infrastructure Ltd.
Complainant	Cdr Praveen Sharma & 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 20 of the Builder Buyer Agreement dated 30.12.2011 for unit No.E-111, 11th floor, tower-E, 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 30.6.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,92,10,310/- to the respondent against a total sale consideration of Rs.1,95,21,000/-. The respondent has already offered the possession of the unit to the complainant on 15.11.2018. As such, complainant is entitled for delayed possession charges at prescribed rate of

interest i.e. 10.75% per annum w.e.f 30.6.2015 to 15.11.2018 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. : 589 of 2018
**Date of First
Hearing : 20.09.2018**
Date of Decision : 23.01.2019

Commander Praveen Sharma & Shefali Sharma
R/o: C-42, Brahma apartment, plot no. 7,
Dwarka Sector-7, New Delhi-110075

Complainants

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
Shri Rahul Yadav
Shri Ashish Kumar

Advocate for the complainants
Advocate for the respondent
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 complainants Commander Praveen Sharma and Mrs. Shefali Sharma, against the promoter M/s Athena Infrastructure Ltd in respect of apartment/unit described below in the project 'India Bulls Enigma', Sector-110, Gurugram on account of violation of the section 11(4)(a) of the Act ibid for not developing the project within stipulated period.

2. Since, the flat buyer agreement has been executed on 30.12.2011 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot 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: -

1.	Name and location of the project	India bulls enigma, Sector-110
2.	Nature of the project	Residential Complexs
3.	RERAre gistered/un registered.	Registered
4.	RERA Registration no.	351 of 2017 dated 20.11.2017



5.	Revised Date	31.08.2018
6.	Project area	12.85 acres
7.	DTCP License no.	213 of 2007, 64 of 2012 and 10 of 2011
8.	Apartment/unit no.	E-111, 11 th floor, tower E
9.	Apartment measuring	3880 sq. ft.
10.	Payment plan	Construction linked payment plan
11.	Date of execution of buyer's agreement	30.12.2011
12.	Total consideration	Rs. 1,95,21,000/- As per statement of account dated 19th April, 2018, page 80, Annexure-3
13.	Total amount paid by the complainant till date	Rs.1,92,10,310/- As per statement of account dated 19th April, 2018, Annexure-3
14.	Date of delivery of possession Clause 20 – 3 years plus 6-month grace period from the execution of flat buyer's agreement.	30.06.2015
15.	Date of offer of possession	15.11.2018
16.	Penalty clause (clause 21)	Rs. 5 per sq. ft. per month of the super area



4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainants and the respondent. A flat buyer agreement dated 30.12.2011 is available on record for the aforementioned apartment according to which the possession of the aforesaid unit was to be delivered on 30.06.2015. The promoter has neither fulfilled his committed liability by not giving possession as per the terms of the flat buyer agreement. Neither paid any compensation i.e. Rs.5/- per sq. ft. per month for the period of delay as per flat buyer's agreement dated 30.12.2011 which is in violation of section 11(4)(a) of the Act *ibid*.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent appeared on 24.05.2018. The case came up for hearing on 20.09.2018,12.12.2018,23.01.2019. The reply was filed by the respondent dated 20.09.2018.



Facts of the complaint

6. Briefly stating the facts of the complaint, the complainants booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurugram.

7. 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. The complainants were further induced to sign a pre-printed flat buyer's agreement dated 30.12.2011 and vide aforesaid flat buyers agreement the respondent allotted flat bearing no. E-111 on 11th floor in tower no. E, admeasuring super area of 3880sq.ft. to the complainants.
9. The complainants have paid a total sum of Rs. 1,92,10,310/- towards the aforesaid residential flat in the project from April 2011 to October 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 miserably failed to offer the possession of the flat in question till date despite delay of more than three years.

10. 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's agreement was executed on 30.12.2011 and till date the construction is not complete.

11. 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 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.



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 unlawful act of increasing the FAR, the respondent referred to an obscure notice released by the respondent in non-descript newspapers 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.

14. 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.



15. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. After gaining knowledge of the amounts collected by the respondents, the

respondent finally on 05.08.2016 adjusted the excess amount of Rs. 3,49,200/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,49,200/- 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 30.12.2012 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. The complainant is eligible for seeking delay penalty interest@ 18% on the amount deposited by the complainants from the original date of possession till the time possession is finally handed over to the complainants complete in all aspects.



18. Issues 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., till the time possession is handed over to the complainant?
- III. Whether the respondent/ promoter 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 and PLC?

19. Relief sought

- I. Direct the respondent to pay refund the entire amount along with interest as deposited by the complainants towards the sale consideration of the booked unit or in alternative award delay interest @18% p.a for every month of delay, till the handing over the possession.



- 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, PLC 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. It is submitted that 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 Consumer Forum/ Commission and is pending, in such eventuality such complainant will have to withdraw his complaint with permission from the Id. 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 complainant have preferred to file their complaint before the authority for adjudication of their complaint, however the same is ought to be filled before adjudicating officer as per section 71 (1) of the RERA Act, 2016. Hence it is respectfully submitted that, the instant complaint be referred to the Id. adjudicating officer and this authority may dismiss the same forthwith.

23. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them dated 30.12.2011. 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 wilful 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 Act, 2016, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainants in the present complaint.

24. 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 agreement which covers the exigencies of inordinate delay caused in completion and handing over of the booked unit i.e. enumerated in the "**Clause 21**" of duly executed agreement, filed by the complainants along with their complaint.

25. The respondent submitted that the complainants only after being satisfied with the project in totality 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.

26. The respondent also submitted that he has already completed the construction of the “tower E” and will be applying for grant of occupational certificate in short span of time for the said tower.

27. 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 38**” of FBA at page 70 annexed with the complaint by the complainants.

28. 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.

29. The respondent submitted that the agreement for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer's agreement dated 30.12.2011 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 agreement being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA Act, 2016 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.



30. 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 monies 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.



31. The respondent submitted the fact that the instant complaint is not maintainable, on facts or on 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.

32. 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.

33. 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 wilful defaulters from the beginning and not paying the instalments as per the payment plan.



34. 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.

35. The respondent submitted that as per the agreement dated 30.12.2012, was 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.



36. 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

37. With respect to **issue no. 1 and 2** it is fortified from the fact that as per clause 20 of the flat buyer's agreement dated 30.12.2011, 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 30.06.2015 which has already lapsed. Thus the complainants are entitled for interest i.e 10.75% on the delayed possession at the prescribed rate under the Act. Delay charges will accrue from the due date of possession i.e. 30.06.2015 till the offer of possession.

38. In respect of **3,4 and 5 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 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 by the respondent as per the payment plan as agreed by the complainants and the complainant have failed to furnish any material particulars in order to prove that he has been wrongfully charged service tax or PLC and overcharged EDC and IDC. Hence, these issues are decided in negative.

39. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

34 (f) Function of Authority –

To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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 which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.



Findings of the authority

40. The respondent admitted the fact that the project India Bulls Enigma is situated in Sector-113, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try 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 Arun Kumar Gupta, Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint.

41. **Jurisdiction of the authority-** 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.

42. The respondent has already offered the possession of the unit to the complainants on 15.11.2018. As such, the complainants are entitled for delayed possession charges at prescribed rate of interest.



Decision and directions of the authority

43. 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 pay interest @ 10.75% p.a. on the paid amount by the complainants from the due date of delivery of possession i.e. 30.06.2015 till the date of offer of possession i.e 15.11.2018 for the delay occurred in delivery of possession.
- (ii) The arrears of interest so accrued @ 10.75% p.a. shall be paid to the complainants within 90 days from the date of this order.

44. The complaint is disposed of accordingly.

45. The order is pronounced.



46. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

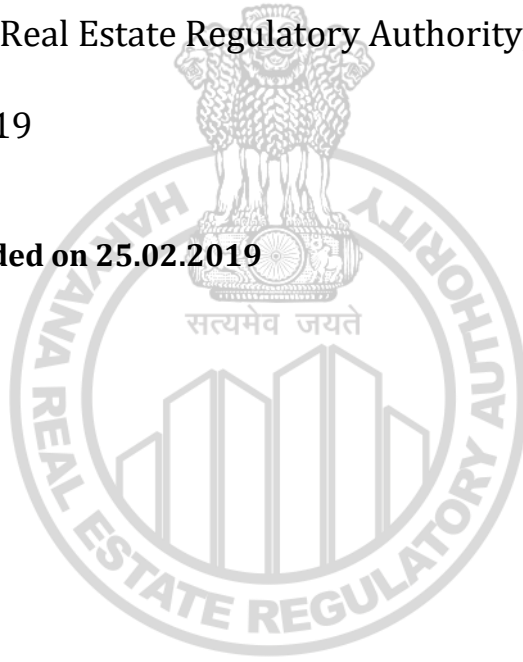
(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.01.2019

Judgement uploaded on 25.02.2019



HARERA
GURUGRAM

