

**PROCEEDINGS OF THE DAY**

Day and Date	Tuesday and 29.01.2019
Complaint No.	857/2018 Case Titled As Mr. Anil Goswami & Anr V/S M/S Athena Infrastructure Limited
Complainant	Mr. Anil Goswami & another
Represented through	Shri Anand Dabas, Advocate for the complainant.
Respondent	M/S Athena Infrastructure Limited
Respondent Represented through	Shri Rahul Yadav Advocate for the respondent.
Last date of hearing	21.12.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

**Proceedings**

**Project is registered with the authority.**

Arguments heard.

As per clause 21 of the Builder Buyer Agreement dated 19.7.2011 for unit No.B103, 10<sup>th</sup> floor, Tower-B, in project "Indiabulls Enigma" Gurugram, possession was to be handed over to the complainant within a period of 3 years + 6 months grace period which comes out to be 19.1.2015 . However, the respondent has not delivered the unit in time. However, complainant has already paid Rs.1,84,80,387/- to the respondent against a total sale consideration of Rs.1,89,73,735/-. Since the project is registered, as such revised date of delivery of possession is March 2019. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 19.1.2015 as per the provisions of

section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till handing over possession failing which the complainant is entitled to seek refund of the amount.

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 handing over the possession shall be paid before 10<sup>th</sup> 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)  
29.1.2019

Subhash Chander Kush  
(Member)

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

**Complaint no. : 857 of 2018**  
**First date of hearing : 21.12.2018**  
**Date of decision : 29.01.2019**

1. Mr. Anil Goswami,  
2. Mrs. Sudesh Goswami,  
Both R/o Flat No. B-801-P, Dew Drops Society, **Complainant**  
Plot no. GH-5, Sector 47, Gurugram-122001.

Versus

M/s Athena Infrastructure Ltd.  
Office address: M62 & 63, First Floor,  
Connaught Place, New Delhi-110001. **Respondent**

**CORAM:**

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

**APPEARANCE:**

Shri Anand Dabas Advocate for the complainants  
Shri Rahul Yadav Advocate for the respondent

**ORDER**

1. A complaint dated 06.09.2018 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. Anil Goswami and Mrs. Sudesh Goswami, against the promoter M/s Athena Infrastructure Ltd, on account of violation of the clause 21 of the flat buyer's agreement executed on



19.07.2011 in respect of flat described below in the project 'Indiabulls Enigma' for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer's agreement has been executed on 19.07.2011, 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: -

- **Nature of the project- Group housing colony**
- **DTCP License no.- 213 of 2007 dated 5.9.2007,  
10 of 2011 dated 29.1.2011  
64 of 2012 dated 20.6.2012**

1.	Name and location of the project	"Indiabulls Enigma", Pawala Khusrupur Village, Gurugram, Haryana
2.	RERA Registered/ not registered	<b>Registered separately in 3 phases namely: Phase I- 351 of 2017 Phase 1A- 353 of 2017 Phase II- 354 of 2017</b>
3.	HRERA registration certificate	For reg. no. 351 of 2017-



	valid upto	<b>31.08.2018</b> For reg. no. 353 of 2017- <b>31.03.2018</b> For reg. no. 354 of 2017- <b>30.09.2018</b>
4.	The respondent applied for extension on 18.09.2018 wherein it has mentioned revised date of possession as	<b>March 2019</b>
5.	Flat/unit no.	B103, 10 <sup>th</sup> floor, tower B
6.	Flat measuring	3350 sq. ft.
7.	Date of execution of flat buyer's agreement-	19.07.2011
8.	Payment plan	Construction linked payment plan
9.	Total cost of the said flat (as per applicant ledger dated 09.07.2018, pg 56 of the complaint)	Rs.1,89,73,735/-
10.	Total amount paid by the complainant till date (as per applicant ledger dated 09.07.2018, pg 56 of the complaint)	Rs.1,84,80,383/-
11.	Date of delivery of possession as per clause 21 of flat buyer's agreement (3 years + 6 months grace period from the date of execution of agreement i.e. 19.07.2011)	19.01.2015
12.	Delay in handing over possession till 29.01.2019	4 years 10 days
13.	Penalty clause as per the said flat buyer's agreement	Clause 22 of the agreement i.e. Rs.5/- per sq. ft. per month for the period of delay



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 flat buyer's agreement dated 19.07.2011 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 19.01.2015. Neither the respondent has delivered the possession of the said unit till date to the complainants nor has paid any compensation @ Rs.5/- per sq. ft. per month for the period of delay as per clause 22 of the said flat buyer's 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 appearance. The case came up for hearing on 21.12.2018 and 29.01.2019. The reply filed on behalf of the respondent has been perused.

#### **Facts of the complaint**

6. Briefly stated, the facts of the complaint are that the real estate project of the respondent namely "Indiabulls Enigma" is situated at Sector 110, Village Pawala-Khusrupur, Gurugram therefore, the hon'ble authority does have the jurisdiction to try and decide the present complaint. It is submitted that the subject matter of the present complaint is with respect to refund of the principal amount/money paid by the complainants along with penalty, interest and



compensation, therefore, it falls within the provisions of the Act *ibid* and Rules *ibid*.

7. The complainants submitted that somewhere in the end of 2010, the representative through its marketing executives and advertisement through various medium and means approached the complainants with an offer to invest and buy a flat in the proposed project of respondent, which the respondent was going to launch namely 'Indiabulls Enigma' in Sector 110, Gurugram.
8. The complainants submitted that relying upon those assurances and believing them to be true, the complainants jointly being husband and wife had booked a residential flat bearing no. B-103 on 10<sup>th</sup> floor in tower B in the proposed project measuring approximately 3350 sq. ft. of super area and 2570.67 sq. ft. of covered area. It was assured and represented to the complainants by the respondent that it had already taken the required necessary approvals and sanctions from the concerned authorities and departments to develop and complete the proposed project on the time as assured by the respondent. Accordingly, the complainants had paid Rs,5,00,000/- through cheque dated 22.10.2010.



9. The complainants submitted that they time and again requested the respondent to execute the flat buyer's agreement as per its promise and assurance but the respondent acting arbitrarily and negligently has refused and ignored the requests and demands of the complainants on the lame excuses and deliberately and intentionally delayed the execution of the flat buyer's agreement for more than one year and ultimately it was executed on 19.07.2011.
10. The complainants submitted that the respondent while taking undue advantage of its dominant position had illegally changed and increased the per sq. ft. sale price of the said flat from Rs.5,000/- (as mentioned in application form) to Rs.5,279/- per sq. ft. without giving any sufficient or logical explanation for the same and has refused to entertain any objection or request of the complainants in this regard.
11. The complainants submitted that as per clause 21 of the said agreement dated 19.07.2011, the respondent had agreed and promised to complete the construction of the said flat and deliver its possession within a period of 3 years with a six months grace period thereon from the date of execution of the said flat buyer's agreement.





12. The complainants submitted that they had solely paid the entire sale consideration to the respondent for the said flat. As per statement of account dated 09.07.2018, issued by the respondent upon the requests of the complainants, the complainants have already paid Rs.1,84,80,383/- towards total sale consideration as on today.
13. The complainants submitted that they have written several emails to the CEO and customer care of the respondent company regarding the arbitrary and illegal increment of the basic sale price in per sq. ft. and objected the same vehemently. However, the respondent did not pay any heed to the request of the complainants and refused to revise the price in any manner or under any circumstances whatsoever as agreed by it in the provisional application form.
14. The complainants submitted that due to the failure on the part of the respondent to deliver the said flat on time as agreed in the said agreement, the complainants were constrained to stay in the rented accommodation by paying monthly rent along with the monthly instalments of home loan taken by him for the aforesaid flat. The complainants have therefore paid Rs,20,40,000/- as rentals @Rs,40,000/- per month for the rented accommodation for the period of delay i.e. 51 months from April 2014 to July 2018.



15. The complainants submitted that the cause of action accrued in favour of the complainants and against the respondent on 22.10.2010 when the complainants had booked the flat and further it arose when respondent failed/neglected to deliver the said flat. The cause of action is continuing and is still subsisting on day to day basis.

**Issues to be decided**

16. The relevant issues raised by the complainants are as follows:
- Whether the complainants are entitled for refund of sale consideration amounting to Rs.1,84,80,383/- along with interest @ 18% p.a. on the total sale consideration paid by the complainants?
  - Whether the respondent is liable to be prosecuted for contravening section 12, 14 and 15 of the Act ibid?

**17. Reliefs sought:**

The complainants are seeking the following reliefs:

- Direct the respondent to refund the amount of Rs.1,84,80,383/- paid by the complainants as sale consideration of the said flat along with future and pendente lite compounding interest @ 18% p.a. from the date of payment till its final payment.



- ii. Direct the respondent to pay an amount of Rs.55,000/- to the complainants as cost of the present litigation.

### **Respondent's reply**

18. The respondent submitted that the instant complaint is not maintainable, on facts or in law, and is as such liable to be dismissed at the threshold being filed under provisions of RERA Act to be adjudicated only before the adjudicating officer.
19. The respondent submitted that complainants are guilty of suppression veri and suggestion falsi and has in fact concealed the true facts about their approaching the NCDRC for the baseless grievances against the respondent and thus try to mislead the hon'ble authority. That the instant complaint filed by the complainants is liable to be dismissed in view of section 71(1) of the Act *ibid*, which specifically states that any consumer/complainant who has already filed a complaint before the consumer forum/ commission and is pending, in such eventuality such consumer/complainant will have to withdraw his complaint with permission from learned consumer forum/commission to file an application before the adjudicating officer for adjudication of his dispute.



Hence, the instant complaint is liable to be dismissed on the very sole ground.

20. The respondent submitted 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.
21. The respondent submitted that the relationship between the complainant and the respondent is governed by the document executed between them i.e. FBA dated 19.07.2011. It is pertinent to mention herein that the instant complaint the complainant with malafide intention has not disclosed, infact concealed the material fact from this hon'ble authority that the complainant has been a wilful defaulter since the beginning not paying their instalments on time as per the construction link plan opted by the complainant.
22. The respondent submitted that they have already completed the construction of tower B and will be applying for grant of



OC for the concerned tower and will hand over possession of the unit in question to its respective buyers in short span of time.

23. The respondent submitted that the FBA dated 19.07.2011 was executed much 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 FBA being referred to or looked into in this proceeding is an agreement executed much before the commencement of the Act.

#### **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:

24. With respect to the **first issue** raised by the complainants, as per clause 21 of the agreement dated 19.07.2011, 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 said agreement. The due date of possession comes out



to be 19.01.2015 which has already lapsed. However, as the construction of the project is almost complete, and the project is registered wherein the revised date of delivery of possession is March 2019, refund cannot be allowed keeping in view the interest of other allottees who wish to continue with the project. Therefore, the respondent is liable to pay interest on the delayed possession. Delay charges will accrue from the due date of possession i.e. 19.01.2015 till the handing over of possession.

25. With respect to the **second issue**, these sections are not applicable retrospectively. Therefore, this issue becomes infructuous.

#### **Findings of the authority**

26. The authority has complete jurisdiction to decide the complaint in regard to 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. 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.

27. As per clause 21 of the agreement dated 19.7.2011, possession was to be handed over to the complainants within a period of 3 years + 6 months grace period which comes out to be 19.01.2015. However, the respondent has not delivered the unit in time. The complainants have already paid Rs.1,84,80,387/- to the respondent against a total sale consideration of Rs.1,89,73,735/-. Since the project is registered, as such revised date of delivery of possession is March 2019. Thus, keeping in view the status of the project and the interest of other allottees, the authority is of the opinion that the complainants are entitled to delayed possession interest at the prescribed rate of 10.75% per annum from the due date of possession, i.e. 19.01.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till handing over possession failing which the complainant is entitled to seek refund of the amount.



### Decision and directions of the authority

28. 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:

- (i) 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 from due date of possession, i.e. 19.01.2015 till the actual handing over of possession.
- (ii) The respondent is directed to pay interest accrued from 19.01.2015 (due date of possession) to 29.01.2019 (date of this order) on account of delay in handing over of possession to the complainants within 90 days from the date of this order.
- (iii) Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid before 10<sup>th</sup> of every subsequent month.
- (iv) The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.

29. The complaint is disposed of accordingly.





30. The order is pronounced.

31. Case file be consigned to the registry.

**(Samir Kumar)**

Member

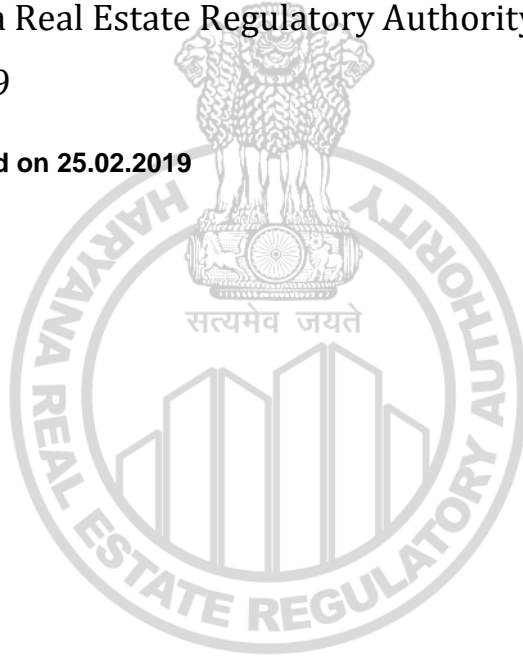
Haryana Real Estate Regulatory Authority, Gurugram

**(Subhash Chander Kush)**

Member

Date: 29.01.2019

Judgement uploaded on 25.02.2019



HARERA  
GURUGRAM

