

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 23.01.2019
Complaint No.	592/2018 Case Titled As Mr. Sameer Singh & Anr V/S M/S Athena Infrastructure Ltd.
Complainant	Mr. Sameer Singh & 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 21 of the Builder Buyer Agreement dated 31.1.2012 for unit No.J072, 7th floor, tower-J, 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 30.7.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,95,78,000/- to the respondent against a total sale consideration of Rs. 2,03,45,750/-. The respondent has already offered the possession to the complainant on 31.12.2018. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f

30.7.2015 to 31.12.2018 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.

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)
23.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 592 of 2018
First date of hearing : 12.12.2018
Date of decision : 23.01.2019

1. Mr. Sameer Singh
2. Mrs. Tripti Singh
Both R/o. I-5052, Devender Vihar,
A WHO, Sector-56, Gurugram.

Complainants

Versus

M/s Athena Infrastructure Ltd.
Office address: M62 & 63, 1st Floor,
Connaught Place, New Delhi-110001.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vaibhav Suri Advocate for the complainants
Shri Rahul Yadav Advocate for the respondent
Shri Ashish Kumar Authorised 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 Mr. Sameer Singh and Mrs. Tripti Singh, against the promoter M/s Athena



Infrastructure Ltd, on account of violation of the clause 21 of the flat buyer's agreement executed on 30.01.2012 in respect of flat described below in the project 'Indiabulls Enigma' for not giving 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 30.01.2012 i.e. prior to the commencement of the Act *ibid*, 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 Act *ibid*.
3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Indiabulls Enigma", Pawala Khusrupur Village, Sector 110, Gurugram, Haryana
2.	Nature of the project	Group housing colony
3.	Project area as per the flat buyer's agreement	15.6 acres
4.	DTCP license no.	213 of 2007, 10 of 2011 and 64 of 2012
5.	RERA Registered/ not registered.	Registered
6.	HRERA registration number	351 of 2017
7.	HRERA registration certificate valid upto	31.08.2018
8.	Occupation certificate	Received by respondent



9.	Approval of revised building plan	23.08.2013
10.	Flat/unit no.	J-072, 7 th floor, tower J
11.	Flat measuring	3830 sq. ft.
12.	Date of allotment letter	16.01.2012
13.	Date of execution of flat buyer's agreement-	30.01.2012
14.	Payment plan	Construction linked payment plan
15.	Basic sale price as per the said agreement	Rs.1,89,01,000/-
16.	Total cost of the said flat as per statement of account dated 11.08.2016	Rs.2,03,45,750/-
17.	Total amount paid by the complainants till date as per statement of account dated 11.08.2016	Rs.1,95,78,000/-
18.	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. 30.01.2012)	30.07.2015
19.	Date of offer of possession	31.12.2018
20.	Delay in handing over possession till date of offer of possession	3 years 5 months 1 day
21.	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 30.01.2012 is available on record for the aforesaid apartment according to which the possession of the same was

to be delivered by 30.07.2015 and the possession was offered to the complainants on 31.12.2018. The respondent has not paid interest on delayed possession @ Rs.5/- per sq. ft. per month for the period of delay as per clause 22 of the flat buyer's agreement duly executed between the parties. Therefore, the promoter has not fulfilled their committed liability.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on 12.12.2018. The case came up for hearing on 12.12.2018 and 23.01.2019. 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 complainants booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurugram in Pawala Khusrupur Village, Gurgaon Tehsil, Gurugram.
7. The complainants submitted that they were induced by the assurances and promises made by the respondent and accordingly the complainants booked a flat with the respondent in the project in question. The respondent



pursuant to the booking issued allotment letter dated 16.01.2012 and vide aforesaid allotment letter, the respondent allotted flat bearing no. J-072 on 7th floor in tower no. 'J', admeasuring 3830 sq. ft. to the complainants. It is pertinent to mention that subsequent to issuance of allotment letter, the respondent executed a flat buyer's agreement and vide aforesaid agreement the respondent confirmed the provisional allotment of complainants.

8. The complainants submitted that they have paid a total sum of Rs.1,95,78,000/- towards the aforesaid residential flat in the project from January 2011 to December 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 27.02.2012, which is also in terms with the construction linked payment plan, however still the respondent miserably failed to offer the possession within the agreed time frame.
9. The complainants submitted that the respondent had promised to complete the project within a period of 36 months from the date of execution of the flat buyer's agreement with a further grace period of six months. However, in the present case the flat buyer's agreement executed by the respondent is undated and therefore date of first payment should be considered for the purposes of calculating three years.



10. The complainants submitted that 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 complainants 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. It shall ultimately disturb the density of the colony and its basic design attraction; it will create an extra burden on the common amenities and facilities.

11. The complainants submitted that 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.



12. The complainants submitted that the unlawful act of increasing the FAR, the respondent referred to an obscure notice released by the respondent in non-descript newspaper(s) advertising the said change in plan. This unconscionable act is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. In this regard, it is pertinent to note that the respondent has 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.

13. The complainants submitted that the respondent has illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. 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 finally on 05.08.2018 adjusted the excess amount of Rs.3,27,465/. The respondent did not pay any interest to the complainants on the amount of Rs.3,27,465/- 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.

Issues to be decided

14. The complainants have raised the following issues:
- i. Whether the respondent made false representations about the project in question in order to induce the complainants to make a booking?
 - ii. Whether the respondent has unjustifiably delayed the construction and development of the project in question and thus liable to pay delayed interest till the possession is handed over to the complainants?
 - 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?

15. Reliefs sought:

The complainants are seeking the following reliefs:

- i. Award delay interest for every month of delay, till the handing over of possession of the apartment complete in all respect, to the complainants.
- 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 as well as for wrongfully inflating the super area.

Respondent's reply

16. 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 in wrong provisions of the law. The 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.

17. 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.

18. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. flat buyer's agreement dated 30.01.2012. It is pertinent to mention herein that in the instant complaint, the complainants with mala fide intention has not disclosed, in fact concealed the material fact from this



hon'ble authority that the they have been wilful defaulters since the beginning by not paying their instalments on time as per the construction link plan opted by them.

19. The respondent submitted that it has already completed the construction of tower 'J' and has already obtained occupation certificate for the said tower and has already initiated the procedure of handing over possession of the units of tower 'J' to its respective buyers. The delay in delivering the possession of the flat to the complainants were beyond the control of the respondent, since for completing a project a number of permissions and sanctions are required from numerous governmental authorities which were delayed with no fault of the respondent, in addition to the problems related to labour/raw material and governmental restrictions including NGT which imposed a ban on carrying out construction in Delhi NCR for several months.

20. The respondent submitted that the agreement that has been referred to is the flat buyer's agreement dated 30.01.2012, has been 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 *ibid*.

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:

21. With respect to the **first issue** raised by the complainants, the complainants have 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.
22. With respect to the **second issue** raised by the complainants, 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 said agreement dated 30.01.2012, 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 relevant clause is reproduced as under:

“The developer shall endeavour to complete the construction of the said building/unit within a period of three years, with a six months grace period thereon from



the date of execution of the flat buyers agreement subject to timely payment by the buyer(s) of total sale price payable according to the payment plan applicable to him or as demanded by the developer..."

23. The due date of possession comes out to be 30.07.2015 which has already lapsed but the respondent sent letter of offer of possession to the complainants on 31.12.2018. Therefore, delay in handing over possession shall be computed from due date of handing over possession till offer of possession. The possession has been delayed by 3 years 5 months and 1 day from due date of possession till the offer of possession. 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 *ibid*. Delay charges will accrue from the due date of possession till offer of possession.

24. With respect to the **third issue**, the complainants were well aware about the lawful dues to be paid towards EDC/IDC. As per clause 6(vii) of the flat buyer's agreement, the respondent can charge revised EDC/IDC charges with retrospective effect as imposed by the central or state government or any other authority. Thus, EDC/IDC has been charged as per the terms of the agreement and thus, the issue is decided in negative.



25. With respect to the **fourth and fifth issue**, the respondent has submitted in his reply that the extra floors have no bearing on the amount paid by the complainants and it is denied that the increase in floors/FAR has changed the theme of the project or that it shall disturb the density of the colony. Further, as per clause 18 of the flat buyer'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 complainants 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

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 complainants at a later



stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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. The authority has observed that as per clause 21 of the said agreement dated 31.01.2012 for unit no. J072, 7th floor, tower-J, in project "Indiabulls Enigma" Gurugram, possession was to be handed over to the complainants within a period of 3 years + 6 months grace period from date of execution of the said agreement which comes out to be 30.7.2015. However, the respondent has not delivered the unit in time. Complainants have already paid Rs.1,95,78,000/- to the respondent against a total sale consideration of Rs. 2,03,45,750/-. The respondent has already offered the possession to the complainants on 31.12.2018. As such, complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f. 30.7.2015 to 31.12.2018 as per section 18(1) proviso of the Act *ibid*.



Decision and directions of the authority

28. After taking into consideration all the material facts adduced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions:

- (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.
- (ii) The respondent is directed to pay interest accrued from 30.07.2015 to 31.12.2018 on account of delay in giving possession to the complainants within 90 days from the date of order.
- (iii) The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainants, if any.



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

Dated: 23.01.2019