

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 23.01.2019
Complaint No.	595/2018 Case Titled As Mrs. Sirisha Gummadi & Anr. V/S M/S Athena Infrastructure Ltd.
Complainant	Mrs. Sirisha Gummadi & 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 19.3.2014 for unit No.12-B2, 12th floor, tower-B, 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 19.9.2017. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.2,52,64,906/- to the respondent against a total sale consideration of Rs.2,60,08,750/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per

annum w.e.f 19.9.2017 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 10th of subsequent month. The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant.

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. : 595 of 2018
First date of hearing: 20.09.2010
Date of decision : 23.01.2019

Mrs. Sirisha Gummadi
Mr. Srikanth Gummadi
Both R/o J-301, Mantri Espana, Kariyammna
Agrahara, ORR, Bellandur Bangalore, KA-560103 **Complainants**

Versus

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

CORAM:

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

APPEARANCE:

Shri Vaibhav Suri Advocate for the complainants
Mr. Rahul Yadav Advocate for the respondent

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 Mrs. Sirisha Gummadi and Mr. Srikanth Gummadi, against the promoter M/s Athena Infrastructure Ltd. in respect of apartment 12B2



on 12B floor in tower B in the project 'India bulls enigma', on account of violation clause 21 of the builder buyer agreement dated 19.03.2014 for not handing over possession on due date i.e. 19.09.2017 which is an obligation under section 11(4)(a) of act ibid.

2. Since, the buyer's agreement has been executed on 19.03.2014 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 case are as under: -

1.	Name and location of the project	India bulls enigma in Pawala, Khusrupur Village, Gurgaon Tehsil and District Gurgaon
2.	Nature of the project	Residential
3.	RERA registered/ not registered.	Registered (351 of 2017)
4.	Revised date of completion as per registration certificate	31.08.2018
5.	The respondent applied for extension of registration and	15.08.2019



	revised date of possession is	
6.	Apartment/unit no.	12B2 on 12B floor in tower B
7.	Apartment measuring	3350 sq. ft.
8.	Payment plan	Subvention scheme
9.	Date of execution of buyer's agreement	19.03.2014
10.	Total consideration	Rs. 2,60,08,750/- (annexure -5 page 92)
11.	Total amount paid by the complainant till date as per the receipts attached with the complaint	Rs.2,52,64,906/- (annexure -5 page 93)
12.	Date of delivery of possession Clause 21 – 3 years plus 6-month grace period from the execution of flat buyer agreement.	19.09.2017
13.	Delay of number of months/years	1 year 4 months approx..
14.	Penalty clause (clause 22)	Rs. 5 per sq. ft. per month of the super area

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The case came up for hearing on 12.12.2018 and 22.01.2019. The reply has been filed on behalf of the respondent which has been perused.



Facts of the case

5. That 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, Gurgaon.
6. The complainants submitted that they 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 also represented that all necessary sanctions and approvals had been obtained to complete the same within promised time frame.
7. That the complainants 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 issued allotment letter dated 17.01.2013 and vide aforesaid allotment letter the respondent allotted flat bearing no. B-12B2 on 12B floor in tower no. B, admeasuring super area of 3350 sq. ft. to the complainants.



8. The complainants submitted that they have paid a total sum of Rs. 2,52,64,906/- towards the aforesaid residential flat in the project from 2012 to 2013 as and when demanded by the respondent. It is pertinent to state that the respondent collected more than 95% of the sale consideration was paid to the respondent by 11.02.2013 but still the respondent has failed to deliver the possession within the agreed time frame and has miserably delayed the project.
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 builder buyer agreement with a further grace period of six months. However, the FBA executed by the respondent is undated and therefore date of first payment should be considered for the purposes of calculating 3 years.
10. The complainants submitted that the respondent lured them to avail financial assistance from India Bulls Housing Finance Ltd. which is a financial institution owned and controlled by the company of respondent. The parties executed a tri-partite agreement dated 05.02.2013 wherein it was mentioned and



agreed that the respondent shall be liable for payment of interest to IHFL for period of 30 months. It is pertinent to mention that the complainants had signed the tri-partite agreement on the date of signing of application form, however when the complainants received a copy of the tri-partite agreement it bore 05.02.2013 as date of execution and not November, 2012. It is submitted that the respondent as agreed in the tri-partite agreement did not pay the interest component of the loan for a period of 30 months and paid EMIs only for 27 months. The respondent started paying interest from February, 2013 however; respondent calculated the 30 months period from date of signing of application form i.e. November, 2012 and thus did not make any payment towards interest after May, 2015. i

11. The complainants submitted that the complainants were further induced to signed a pre-printed builder buyer agreement dated 19.03.2014. Further, stated that the complainants started disbursing payments from November,2012 however the FBA was executed only in the



year 2014 after several requests were made by the complainants.

12. 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 builder buyer agreement with a further grace period of six months.

13. 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.



14. The complainants submitted that 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. Further, submitted that the respondent did not seek the consent of the complainants for increasing the floors an increased the floors in a secretive manner.

15. 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 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.

16. The complainants submitted that they 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. 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.

17. The complainants submitted that 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/ promoter finally on 05.08.2016 adjusted the excess amount of Rs. 3,01,500/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,01,500/- 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.



18. The complainants submitted that respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession.

19. Issues to be decided:

- 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% 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?



20. Relief sought:

- i. Direct the respondent to award delay interest @ 18% p.a. for every month of delay, till the handing over of possession of the apartment complete in all respect, to the complainant;
- ii. Direct the respondent to provide 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

21. The respondent submitted the fact that the instant complaint is not maintainable, on facts of 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 complainants before the hon'ble authority is liable to be dismissed in view of section 71 of the RERA Act, 2016. The present complaint is not maintainable before this



hon'ble authority has no jurisdiction to entertain the same and the complaint is liable to be dismissed.

22. 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.

23. The respondent submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. FBA dated 19.03.2014. Further, submitted that complainants have been willful defaulters from the beginning and not paying the installments as per the payment plan opted by them.

24. The respondent submitted that it was in knowledge of the complainants, that there is a mechanism detailed in the FBA



which covers the “clause 22” of duly executed FBA, which is being reproduced hereunder:

“Clause 22: In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay as stipulated herein, except for the delay attributable to the Buyer/ force majeure/vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- per sq.ft. per month for the period of delay....”

25. The respondent submitted that they have already completed the construction of “tower B” and will be applying for grant of OC shortly and will hand over the possession of the unit in question to its buyers in short span of time. That the delay in delivering the possession of the flat to the complainants was beyond the control of the respondent.

26. The respondent submitted that as per the FBA dated 19.03.2014, 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 FBA being referred to or looked into in this proceeding is an agreement executed much before the commencement of the Act.

27. The respondent submitted that the respondent has made huge investments in obtaining requisite approvals and carrying on the construction and development of "INDIABULLS ENGIMA" 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.

Determination of issues

28. With respect to **issues no. 1 and 2** the respondent is liable to pay interest on the delayed possession. This is fortified from the fact that as per clause 21 of the agreement dated 19.03.2014, 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 19.09.2017 which has already lapsed. Thus, the complainant is entitled for interest on the delayed possession at the prescribed rate under the Act. Delay charges will accrue from the due date of possession i.e. 19.09.2017 till the offer of possession.

29. With respect to the **issue no. 3** as per statement of the complainant the respondent has already adjusted the excess amount of Rs.3,01,500/- and at that time when demand was raised by the respondent the complainant paid the said amount and not raised any grievance in respect of the demand. Therefore, at this particular time the complainant cannot raised the said issue. Hence, this issue decided negative.

30. With respect to **issues no. 4 and 5** these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainant has only dealt these issues in the facts of the complaint and no documents have been annexed in respect of the same, thus issues cannot be determined.



Findings of the authority

31. The authority has complete subject matter 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & 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.
32. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter
33. 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 its obligation.

34. As per clause 21 of the builder buyer agreement dated 19.3.2014 for unit no.12-B2, 12th floor, tower-B, 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 19.09.2017. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.2,52,64,906/- to the respondent against a total sale consideration of Rs.2,60,08,750/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 19.9.2017 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till handing over possession failing which the complainant is entitled to seek refund of the amount.

35. 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 10th of subsequent month.



The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant.

Decision and directions of the authority

36. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent is directed to pay the interest at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession i.e. 19.09.2017 till the 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 handing over the 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 complainant.

37. The order is pronounced

38. 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 01.03.2019

HARERA
GURUGRAM

