

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

Complaint no. : 593 of 2018  
First date of hearing : 20.09.2018  
Date of decision : 28.02.2019

Mr. Javed Khan  
R/o: 441, Arunachal Apartments,  
Plot no.-16, Sector 7,  
Dwarka, New Delhi-110075

**Complainant**

Versus

M/s Athena Infrastructures Ltd.  
Address: M-62 and 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 Ashok Kumar

Advocate for the complainant  
Advocate for the respondent  
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 complainant Mr. Javed Khan



against the promoter M/s Athena Infrastructures Ltd., on account of violation of the clause 21 of flat buyer's agreement executed on 08.05.2014 in respect of unit described as below for not handing over possession by the due date i.e. 26.1.2016 which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the buyer's agreement dated 08.05.2014 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively, therefore, the authority has decided to treat this complaint as an application for non-compliance of obligation on the part of the respondents/complainant, as the case may be under section 34(f) of the Act *ibid*.
3. The particulars of the complaint are as under: -

**\*DTCP licence no.** 64 of 2012 dated 20.06.2012, 10 of 2011 dated 29.01.2011, 213 of 2007 dated 05.09.2007

**\*Licence holder:** M/s. Athena Infrastructures Ltd.



1.	Name and location of the project	"INDIABULLS ENIGMA", Pawala Khusrupur Village, Sector 110, Gurugram, Haryana.
2.	RERA registered/ not registered	<b>Registered</b>
3.	RERA registration number	<b>351 of 2017</b>
4.	Revised date of possession as per	31.08.2018

	RERA registration certificate	
5.	Unit no.	A-039, 9 <sup>th</sup> floor, block-A
6.	Unit measuring	3400 sq. ft'
7.	Buyer's agreement executed on	08.05.2014
8.	Total price as per buyer's agreement	Rs.2,06,73,000/-
9.	Total amount paid by the complainants till date	Rs.1,96,10,362/-
10.	Percentage of consideration amount	94.85%
11.	Payment plan	Subvention scheme
12.	Due date of delivery of possession Clause 21 - 3 years from the date of execution of the agreement + 6 months grace period	08.11.2017
13.	Possession offered on	03.07.2018
14.	Delay in handing over possession till date	9 months (approx.)
15.	Penalty clause as per flat buyer's agreement dated 08.05.2014	Clause 22 of the agreement i.e. Rs.5/- per sq. ft' of the super area per month for 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 complainant and the respondent. A flat buyer's agreement is available on record for the aforesaid unit. The possession of the said unit was to be delivered by 08.11.2017 as per the said agreement.
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 complainant on the basis of assurances and representations made by the respondent was induced to book a flat with the respondent in the project in question. Pursuant to the booking made, the complainant disbursed huge payment to the respondent towards sale consideration between 2012 to 2014. However, the respondent being driven by ill intention did not execute flat buyer's agreement on 08.05.2014.
7. The complainant purchased the apartment no A-093, 3400 sq. ft' from Athena Infrastructures Ltd. and paid an amount of Rs. 1,96,10,362/- in toto. The buyer's agreement was signed on 08.05.2012 after paying Rs.5,00,000/0-.
8. The possession of the said apartment was to be delivered on 08.11.2017 i.e. within 36 months with 6 months grace period as mentioned in the buyer's agreement.
9. 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 the detriment of the complainant and unilaterally increased 4 floors in towers A to D. the increase in floors in FAR changed the entire theme of the project and it shall disturb the density of colony and its basic design attraction which will create extra burden on the common facilities.

10. The respondent increased the saleable area much more than which as 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. The respondent did not seek consent of the complainant for increasing the floors and increased the floors in a secretive manner. It is in violation of the representations made by the respondent to the complainant.
11. The complainant has visited the site and observed that there are serious quality issues with respect to the construction carried out by the respondent till now. There are various deviations from the initial representations. The construction is totally unplanned, with sub-standard low grade defective and despicable construction quality.
12. The respondent increased the saleable area which led to strain on common facilities like open spaces, car parking



space and pool usage. The respondent did not seek the consent of complainant for increase in floors and did not provide luxury flats as promised.

13. On 3.7.2018 the complainant received a letter from respondent wherein it was mentioned that respondent has received OC for tower-A from DTCP and thereby offered possession subject to complainant paying the balance consideration.
14. The said demand letter is totally sham as it has been issued with ulterior motives to extract money. The project is totally incomplete and the promised amenities and facilities are missing. The alleged occupancy certificate seems to have been obtained by the respondent in collusion with authorities. The project is far from complete and the respondent has raised illegal demands. Thus, the respondent has not acted bonafidely and has suppressed the interest of the complainant and other homebuyers.



**15. ISSUES RAISED BY THE COMPLAINANT**

- i. Whether the respondent has made false representations about project in question in order to induce the complainant to make a booking?

- ii. Whether the respondent has delayed the construction and development of the project in question?
- iii. Whether the respondent is liable to pay the delay interest @18% till the time possession is handed over to the complainant?
- iv. Whether the respondent/ promoter has over charged EDC, IDC?
- v. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
- vi. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?

#### 16. RELIEF SOUGHT

The complainant is seeking the following reliefs:

- i. Direct the respondent to award delay interest @18% p.a. every month till handing over of possession.



- ii. Direct the respondent to rectify the breaches with regard to extra EDC/IDC charges, VAT, service tax as well as wrongfully inflating the super area.
- iii. Pass any such order which this authority may deem fit and proper.

### RESPONDENT'S REPLY

17. The complaint filed by the complainant is outside the purview of this authority as the complainant is not a consumer and since he himself approached the respondent to book the flat after making due diligence and enquiries before executing the buyers agreement. As per clause 49 of the buyer's agreement it was agreed between both the parties that any dispute arising for the said unit will be adjudicated through the arbitration mechanism. Thus, the complainant is contractually and statutorily barred from invoking the jurisdiction of this authority in the event of a civil dispute.



18. The complaint under sections 12, 18 and 19 are required to be filed before the adjudicating officer under rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017.



19. The respondent has continued with the construction of tower-C which is in completion stage and the respondent will apply for occupation certificate very soon. The delay in completion was beyond the control of the respondent since a number of permissions are required which were delayed including a ban by NGT on construction activities.
20. The buyer's agreement that has been referred to herein was executed much before the coming into force of RERA and RERA rules. Thus, no relief can be granted to the complainants on the basis of the new agreement to sell as per RERA.
21. Around 50% of the buyers have defaulted in payments and there has been many difficulties in getting approvals and then also the respondent did not stop the construction work and has now reached its pinnacle.



#### **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:

22. With respect to the **first issue** relating to misrepresentation, the complainant has only made an assertion without substantiating the same in material particulars. As such the issue cannot be decided.
23. With respect to the **second and third issue**, the authority came across that as per clause 21 of buyer's agreement. The clause regarding the possession of the said unit is reproduced below:

*"21 Possession*

*The company has to hand over possession of the said apartment to the allottee within a period of 36 months from the date of execution of this agreement plus 6 months grace period."*

Accordingly, the due date of possession was 8.11.2017 and the possession was offered on 3.7.2018 so there has been delay of 9 months (approx.).

The promoter is liable under section 18(1)(a) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. 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 18(1)(a) is hereby allowed.



24. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate on the amount deposited by the complainant with the promoter on the due date of possession i.e. 08.11.2017 till 03.07.2018.
25. With respect to **issue no 4, 5 and 6** the authority came across clauses 13 and 18 of the buyer's agreement which are reproduced hereunder:

*"clause 13 - there be any demands or levies by any authorities then the cost of such additional provisions, installations, demands of levies, taxes like turn over tax, VAT or other taxes, charges, levies, duties, cess or imposition imposed by Central and/or State government or any authorities shall be charged additionally, proportionate to the area of the unit."*

*"clause 18 - the buyer has seen the drawings and building plan displayed in the office of the developer showing the proposed buildings on the project land and the building plans, specifications, location of the units/buildings, in which unit applied will be located. The buyer understands and agrees that the floor plans and other terms and conditions as stated in this proposal are tentative and are liable to change, alteration, modification, revision, addition, deletion, substitution or recast instance of the sanctioning authorities/architects of the developer during the course of construction or otherwise and the buyer hereby gives consent to such change and the buyer hereby gives consent*



*to such change, modification, etc. the broad specifications of construction are annexed hereto."*

Therefore, the complainant has agreed to these issues at the time of signing of this agreement and cannot revert the same now.

### FINDINGS OF THE AUTHORITY

26. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. 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.
27. It is an admitted fact that possession has already been offered to the complainant on 03.07.2018. The case of the complainant is that he had booked a unit A-039, 9th floor, in project "INDIANBULLS ENIGMA" with the respondent and buyer's agreement to this effect was executed inter-se both the parties on 30.04.2012. However, on account certain clerical mistakes the complainant had to sign another buyer's agreement on 08.05.2014 which is placed at annexure P-2.



As per statement made at bar by the counsel for the respondent that possession has already been offered to the complainant on 03.07.2018 and the delayed penalty charges have already been paid to the complainant. As per buyer's agreement dated 13.04.2014 which fortified the claim of the complainant with respect to signing of the buyer's agreement on 30.04.2012. At the moment the complainant is seeking delayed possession charges from 08.11.2017 till offer of the possession i.e. 03.07.2018 as per terms of section 18(1) of Real Estate(Regulation and Development) Act, 2016 which is being granted. Both the parties are directed to recalculate the delayed possession charges.

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



### **Decision and directions of the authority**

30. 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) Both the parties are directed to re-calculate the delayed possession charges.
- (ii) The respondent is directed to pay the balance delayed possession charges within a period of 90 days from the date of this order by adjusting already paid delayed possession charges as well as pre-EMI paid by the respondent on behalf of the complainant .

31. Complaint stands disposed of accordingly.

32. File be consigned to the registry.



**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.02.2019

Judgement uploaded on 13.03.2019