

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

Complaint no. : 40 of 2019
First date of hearing : 07.03.2019
Date of decision : 07.03.2019

Mr Rajesh Gulati
R/o D-2/21, DLF-1, Gurugram-122002 **Complainant**

Versus

M/s Athena Infrastructure Ltd
Corporate Office : 448-451, India Bulls House,
Udyog Vihar, Phase V, Gurugram **Respondent**

CORAM

Dr KK Khandelwal **Chairman**
Shri Subhash Chander Kush **Member**

APPEARANCE:

Shri Abhay Jain Advocate for complainants
Shri Rahul Yadav, Advocate Advocate for the respondent
and Shri Ashish Kumar,
authorized representative on
behalf of the respondent

ORDER

1. A complaint dated 17.01.2019 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 Rajesh Gulati against the promoter M/s Athena Infrastructure Ltd. in



respect of unit described below in the project 'India Bulls Enigma' on account of violation of clause 21 of the flat buyer's agreement dated 10.08.2012 for not handing over possession on due date which is an obligation under section 11(4)(a) of act ibid.

2. Since, the flat buyer's agreement was executed on 10.08.2012 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 at Sector 110, Gurgaon
2.	Nature of the project	Group housing colony
3.	Current status of project	95% construction of tower C completed (as per reply submitted by the respondent)
4.	Project area	15.6 acres



5.	DTCP license	213 of 2007 10 of 2011 64 of 2012
6.	RERA registered/ not registered.	Registered (Phase 1)
7.	RERA registration no	351 of 2017
8.	Completion date as per RERA certificate	31.08.2018 (expired but respondent has applied for extension on 18.09.2018)
9.	Apartment/unit no.	C-083, 8 th floor, tower C
10.	Apartment measuring	3400 sq. ft super area
11.	Payment plan	Construction linked payment plan
12.	Date of execution of flat buyer agreement	10.08.2012
13.	Total consideration	Rs 2,05,06,550/- (As per applicant ledger dated 28.04.2018)
14.	Total amount paid by the complainant till date	Rs 1,94,63,040/- (As per calculation sheet submitted by the complainant)
15.	Date of delivery of possession (as per clause 21 – 3 years plus 6 months grace period from the execution of flat buyer agreement)	10.02.2016
16.	Delay	3 years 25 days
17.	Penalty clause (as per clause 22 of flat buyer agreement)	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. A flat buyer agreement dated 10.08.2012 is available on record.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 07.03.2019. The case came up for hearing on 07.03.2019. The reply filed on behalf of the respondent has been perused.

Facts of the case

6. The complainant submitted that the respondent published very attractive brochure highlighting the group housing project of 'Indiabulls Enigma' at sector 110, Gurugram. The respondent claimed to be one of the best and finest in construction and one of the leading real estate developers of the country in order to lure prospective customers to buy apartments in the project.
7. The complainants also submitted that the respondent promised him to handover the possession of the apartment by



10 February, 2016. The complainant was impressed by their statements and representations and paid Rs 5,00,000/- as booking amount on 21.09.2011.

8. The complainant also submitted that he paid as and when demanded by the respondent amounting to a total sum of Rs 1,89,63,040/- for the apartment till date.
9. The complainant also submitted that the respondent violated section 13 of Act by taking more than ten percent of the cost of apartment before signing the flat buyer's agreement and the cost of the apartment is Rs 1,92,45,000/- including EDC and IDC while the respondent had collected a total sum of Rs 81,43,552/- around 42% of the total cost of the apartment till 24.07.2012.
10. The complainant also submitted that the flat buyers agreement was executed on 10.08.2012 after a gap of 11 months from the date of booking of the apartment.
11. The complainant also submitted that he took a loan of Rs 1,49,00,000/- from HDFC Limited in April 2013. The



complainant currently has to pay Rs 1,03,578/- per month only as interest for the loan taken for buying the apartment.

12. The complainant also submitted that he lost confidence in the respondent and intends to withdraw from the project. As per section 18 of the Act, the promoter has an obligation to return the amount received from the complainant with interest at the rate prescribed in the Act.

Issues raised by the complainant

21. The complainant has not raised any issues in the present complaint, therefore the authority has framed issues suo moto which are as follows :

- i. Whether the respondent is liable to refund the entire amount deposited by the complainant along with interest?

or

- ii. Whether the respondent is liable to pay delay interest for every month of delay in offering the possession of the apartment to the complainant?



Reliefs sought

22. The reliefs sought by the complainant are as follows :

- i. To direct the respondent to refund the entire amount deposited by the complainant along with interest.

or

- ii. To direct the respondent to pay delay interest for every month of delay in offering the possession of the apartment since 10.02.2016 to the complainant.
- iii. To direct the respondent to pay legal expenses of Rs. 1,00,000/- to the complainant.

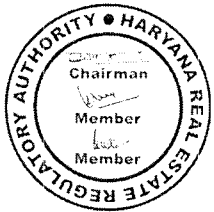
Respondent's Reply

23. 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 authority. That the instant complaint filed by the complainants before the 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 ld. consumer forum/ commission and is pending, in such eventuality such complainants will have to withdraw his complaint with permission from the ld. consumer forum(s)/commission(s) to file an application before the adjudicating officer for adjudication of his dispute, as per the Act.

24. 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*.



25. The respondent submitted that the complainant has 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 Real Estate (Regulation and Development) Act, 2016. Hence it is respectfully submitted that, the instant complaint be referred to the ld. adjudicating officer and this authority may dismiss the same forthwith.

26. 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 10.08.2012. It is pertinent to mention herein that the instant complaint of the complainant is further falsifying their claim from the very fact that, the complainant has filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainant with malafide intention have not disclosed, in fact concealed the material fact from this 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



them. It is stated that the complainant has not come before this authority with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of the Act, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainant in the present complaint.

27. The respondent submitted that it is pertinent to mention here that from the very beginning it was in the knowledge of the complainant, that there is a mechanism detailed in the FBA which covers the exigencies of inordinate delay caused in completion and handing over of the booked unit i.e. enumerated in the "clause 22" of duly executed FBA, which is at page 34 of the FBA filed by the complainant along with their complaint.

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



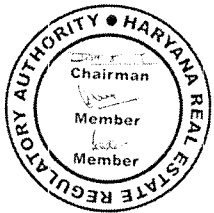
29. The respondent also submitted that he has already completed the 95% construction of the "Tower C" and has filled extension before this authority vide letter dated 18.09.2018. The respondent would be completing the construction of project and would be applying for occupation certificate for the alleged tower very soon.

30. 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. That based upon the past experiences the respondent has specifically mentioned all the above contingencies in the FBA dated 29.02.2012 and incorporated them in "clause 39" of FBA at page 59 annexed with the complaint by the complainants.



31. 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.

32. It is pertinent to mention herein that the agreement for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 10.08.2012 was executed much prior to coming into force of the Act, 2016 and the HARERA Rules, 2017. 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 said Act and said Rules and no other agreement, whereas, the FBA being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA 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 the Act.

33. 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 / customers 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.

Determination of issues

34. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

- i. With respect to **issue no. 1 and 2**, the authority is of the view that as per reply submitted by the respondent, the construction of the ‘Tower C’ where the booked unit is located is 95% completed, therefore keeping in view the current status of the project, the refund cannot be allowed in the interest of the other allottees and the project in question. However 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 flat buyer agreement dated 10.08.2012, 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 10.02.2016 which has already lapsed. and therefore the



respondent is liable to pay interest on the delayed possession. Thus the complainant is entitled for interest on the delayed possession at the prescribed rate i.e 10.75% per annum. Delay charges will accrue from the due date of possession i.e. 10.02.2016 till the offer of possession.

Findings of the authority

35. 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.



36. In the present case, the authority has observed that in the present case the complainant had booked a unit no C083, 8th floor, tower C, India Bulls Enigma, Sector 110, Gurugram and BBA to this effect was executed inter se the parties on 10.08.2012. As per clause 21 of the BBA, respondent was duty bound to deliver the unit within a period of 36 months + 6 months grace period which comes out to be 10.02.2016 but till date respondent has failed to deliver the possession.
37. The counsel for the respondent has submitted that tower in which the apartment of the complainant is situated is in advance stage of construction and likely to be completed soon and offer of possession shall be given within 6 months after obtaining occupation certificate.
38. In view of the facts and circumstances of the matter, the authority is of the considered view that as per section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the complainant is entitled for interest at the prescribed rate of 10.75% per annum for the period of delay in handing over the possession. The builder as well as buyer shall be equitable in charging interest @10.75% i.e default of buyer in making late



payment and delayed possession charges to be given by the respondent.

39. However in case the respondent do not fulfil their commitment they are liable to be proceeded against for penalty proceedings as well as the complainant may approach this authority for refund of amount.

40. The complainant has also submitted calculation sheet.

Decision and directions of the authority

41. 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 provide delay possession charges at the prescribed rate of 10.75% per annum for every month of delay as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.



- ii. The arrears of interest accrued from the due date of possession i.e 10.02.2016 to the date of decision i.e 07.03.2019 amounting to Rs 64,20,137/- shall be paid to the complainant within 90 days from the date of this order and thereafter monthly interest of Rs 1,74,356.41/- before 10th of every subsequent month till the date of offer of possession.
42. The order is pronounced.
43. Case file be consigned to the registry

(Dr K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory
Authority, Gurugram

(Subhash Chander Kush)
Member

Dated : 07.03.2019

Judgement Uploaded on 25.03.2019

