

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

**Complaint no. : 42 of 2019**  
**First date of hearing : 07.03.2019**  
**Date of decision : 07.03.2019**

1. Kavita Singh  
2. Abhimanyu Singh  
Both R/o. D-2/21, DLF Phase I,  
Gurugram-122002.

**Complainants**

Versus

M/s Athena Infrastructure Ltd.  
Office address: 448-451, Indiabulls House,  
Udyog Vihar, Phase V, Gurugram-122016.

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Subhash Chander Kush

**Chairman**  
**Member**

**APPEARANCE:**

Shri Abhay Jain  
Shri Rajesh Gulati  
Shri Rahul Yadav

Advocate for the complainants  
Husband of the complainant  
Advocate for the respondent

**ORDER**

1. A complaint dated 17.01.2018 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 Kavita Singh and Abhimanyu 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 21.07.2011 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 21.07.2011 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.	<b>Registered</b>
6.	HRERA registration number	<b>351 of 2017</b>
7.	HRERA registration certificate valid upto	<b>31.08.2018</b>
8.	<b>Occupation certificate</b>	17.09.2018 (as alleged by the respondent, <b>no documentary proof annexed</b> )
9.	Flat/unit no.	H-011, 1 <sup>st</sup> floor, tower H
10.	Flat measuring	3880 sq. ft.



11.	Date of booking as per applicant ledger dated 11.02.2019	10.03.2011
12.	Date of execution of flat buyer's agreement-	21.07.2011
13.	Payment plan	Construction linked payment plan
14.	Basic sale price as per the said agreement	Rs.2,24,34,160/-
15.	Total cost of the said flat as per applicant ledger dated 11.02.2019 28.04.	Rs.2,43,60,600/- (excluding taxes)
16.	Total amount paid by the complainants till date as per applicant ledger dated 11.02.2019	Rs.2,35,73,874/-
17.	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. 21.07.2011)	21.01.2015
18.	<b>Date of offer of possession</b>	<b>08.01.2019</b>
19.	Delay in handing over possession till date of offer of possession	3 years 11 months 18 days
20.	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 21.07.2011 is available on record for the aforesaid flat according to which the possession of the same was to be delivered by 21.07.2015 and the possession was offered to the

complainants on 08.01.2019. 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 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 complaint**

6. The complainants submitted that the respondent published very attractive brochure, highlighting the group housing project namely 'Indiabulls Enigma', in Sector 110, Gurugram, Haryana. 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. There are fraudulent representations, incorrect and false statements in the brochure. The project was launched in 2011 with the promise to deliver the possession on time and huge funds were collected over the period by the respondent.



7. The complainants submitted that the original allottee was approached by the sales representatives of the company, who made tall claims about the project 'Indiabulls Enigma' as the world class project. He was invited to the sales office and was lavishly entertained and promises were made to him that the possession of the apartment would be handed over by 21.01.2015, including that of parking, horticulture, club and other common areas. He was impressed by their oral statements and representations and ultimately lured to pay Rs.5,00,000/- as booking amount of the said apartment on 01.04.2011.
8. The complainants submitted that the original allottee paid, as and when demanded by the respondent a total of Rs.48,16,125/- till 27.05.2011 but the respondent did not get the flat buyer's agreement signed. The respondent violated section 13 of the Act ibid by taking more than ten percent cost of the apartment before signing the flat buyer's agreement. The cost of the apartment is Rs.2,42,44,200/- including EDC and IDC while the respondent had collected a total sum of Rs.48,16,125/- i.e. around 19% of the total cost of the apartment till 27.05.2011.
9. The complainants submitted that the flat buyer's agreement was executed on 21.07.2011 between the original allottee and



the respondent, after a gap of three (3) months from the date of booking of the apartment. The apartment was purchased by the complainants on 15.09.2012 and an endorsement with regard to transfer of the apartment in the name of the complainants was executed between the original allottee, the complainants and the respondent.

10. The complainants submitted that they further paid all instalments towards the apartment as and when demanded by the respondent and ultimately paid a total of Rs.2,27,98,266/- towards the purchase of apartment, which is reflected in the statement of account dated 28.04.2018. The respondent has charged an interest at the rate of eighteen percent (18%) per annum for the delay payments, as per clause 11 of the flat buyer's agreement.
11. The complainants submitted that they approached the respondent many times and pleaded for delivery of possession of their apartment as per the commitments made in the flat buyer agreement to the complainants, which was 21.01.2015. The respondent did not respond to their letters, emails, telephone calls and personal visits seeking information about the status of the project and delivery of possession of their apartment. The complainants also pointed out clause 21 of the flat buyer agreement stating that the possession of apartment



should be delivered by 21.01.2015 (36 months plus 6 months of grace period). The illegalities and unfairness of the respondent reflect an attitude of the respondent wherein the respondent despite receiving more than ninety-four (94) percent payable amount for the apartment has wilfully failed to deliver the possession until today. This is a violation of section 19 of the Act *ibid*.

12. The complainants submitted that they intend to withdraw from the project. As per the obligations on the respondent/promoter under section 18 of the Act *ibid*, the promoter has an obligation to return the amount received from the complainants with interest at the rate prescribed in the Act *ibid*. The respondent/promoter has neglected his part of obligations by failing to offer possession of the apartment in time. The complainants reserve their right to seek compensation from the promoter for which the complainants may make a separate application to the adjudicating officer, in case it is required.



13. The complainants submitted that respondent has earned enough monies by duping the innocent complainants and other such buyers through his unfair trade practices and deficiencies in services and have caused the complainants

enough pain, mental torture, agony, harassment, stress, anxiety, financial loss and injury.

**Issues to be decided**

14. The complainants have raised the following issues:

- i. Whether the respondent, despite promising the complainants that the unit would be delivered by 21.01.2015, has neither offered possession nor has paid any interest on the amount paid for the delay caused in handing over the possession?
- ii. Whether by delaying possession, the respondent has unjustly enriched himself by taking almost all payable amount and additional charges in lump sum from the complainants and thereafter utilizing that huge money on other projects and left the complainants high and dry at their own fate?

15. **Reliefs sought:**

The complainants are seeking the following reliefs:

- i. The respondent be directed to refund with interest all such amount to the complainants which the respondent has collected from them as the respondent has failed to give possession of the apartment as per the terms and





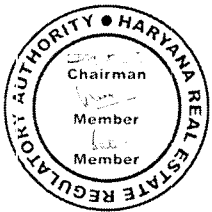
conditions of the flat buyer's agreement to the complainants till date?

**Or**

- ii. The respondent be directed to pay interest for every month of delay in offering possession of the apartment since 21.01.2015 to the complainants, on the amount taken from the complainants for the sale consideration amount and additional charges for the aforesaid apartment with interest at the prescribed rate as per the Act, 2016 till the respondent hands over the possession of the apartment.

### **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 respondent submitted that the unit in question H-011, was initially booked by one Pankaj Jain with the respondent vide flat buyer's agreement (FBA) dated 21.07.2011 signed and executed between the said Pankaj Jain and the respondent, which was subsequently transferred in the name of the complainants on 15.09.2012 vide endorsement letter already filed by the complainants with their complaint. Hence, the complainants are not



actual/original allottee of the said unit rather are subsequent purchaser.

17. The respondent submitted that the complainants looking into the financial viability of the project and its future monetary benefits got multiple units booked in the same project of the respondent, out of which one has been booked by her spouse as well. It is further submitted that the complainants do not fall under the purview of consumer who have booked the said unit for end use, rather the complainants are mere investors who with sole purpose to gain monetary benefits invested their money into the project of the respondent and as such are not entitled for any relief whatsoever from this hon'ble authority since no monetary loss has been suffered by them till date.
18. 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.



19. The respondent submitted that as per clause 49 of the FBA duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement. Thus, the complainants are contractually and statutorily barred from invoking the jurisdiction of this hon'ble authority. It is a trite law that in the event of a civil dispute, the same has to be referred to the jurisdiction of the civil courts who shall refer the dispute to arbitration in the event of the presence of the arbitration clause. Hence this hon'ble authority has no jurisdiction to entertain the present complaint and decide the same and it should be dismissed on the above-mentioned grounds alone.

20. The respondent submitted that the relationship between the complainants and the respondent is governed by flat buyer's agreement dated 21.07.2011 duly endorsed on 15.09.2012. It is pertinent to mention herein that in the instant complaint, the complainants have filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit. However, the complainants with malafide intention has not disclosed, in fact concealed the material fact from this hon'ble authority that the complainants have been willful defaulter, not paying their instalments on time as per the



construction link plan opted by them. It is stated that the complainants have not come before this hon'ble authority with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of RERA, which have been propagated for the benefit of innocent customers who are end-users and not the investors, like the complainants in the present complaint.

21. The respondent submitted that from the very beginning it was in the knowledge of the complainants, 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.
22. The respondent submitted that it has already completed the construction of tower 'H' and has already obtained occupation certificate vide letter dated 17.09.2018 and is in process of handing over the possession of the unit of the alleged tower to their respective buyers/customers. It is further submitted that the delay in delivering the possession of the flat was 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. It is submitted that based upon his past experiences the respondent has specifically mentioned all the above contingencies in clause 39 of FBA dated 21.07.2011.

23. The respondent submitted that the agreement that has been referred to is the flat buyer's agreement dated 21.07.2011, has been executed much prior to coming into force of the Real Estate (Regulation and Development) Act, 2016 and the HRERA 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 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*.



24. The respondent submitted that it 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.

25. The respondent submitted that the complainants have made false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in FBA entered into between the parties. In view of the same, it is submitted that there is no cause of action in favour of the complainants to institute the present complaint.

### **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:

26. With respect to the **first 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 21.07.2011, 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 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...”*

27. Accordingly, the due date of possession comes out to be 21.01.2015 which has already lapsed but the respondent sent letter of offer of possession to the complainants on 08.01.2019. 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 11 months and 18 days 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.



28. With respect to the **second issue**, the complainants have failed to furnish any concrete proof in order to prove any unjust enrichment on part of the respondent and utilizing the money on other projects.

### **Findings of the authority**

29. 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.



30. The authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer



Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

31. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in **civil appeal no.23512-23513 of 2017**.

32. The authority has observed that as per clause 21 of the said agreement dated 21.07.2011 for unit no. H011, 1<sup>st</sup> floor, tower-H, 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 21.01.2015 but the respondent has offered the possession to the complainant on 08.01.2019. Accordingly, there is delay of 3 years 11 months and 18 days. The facts of the matter were agreed by both the parties. Complainants have already paid Rs.2,35,73,874/- to the respondent against a total sale consideration of Rs.2,43,60,600/-. Keeping in view the provisions of section 18(1) of the Act *ibid*, the authority is of the considered view



that respondent is liable to pay interest at the prescribed at the prescribed rate of 10.75% per annum for every month of delay w.e.f. 21.01.2015 to 08.01.2019. 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.

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

33. 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 i.e. Rs. 2,35,73,874/-.
- (ii) The respondent is directed to pay interest accrued from 21.01.2015 to 08.01.2019 on account of delay in giving possession to the complainants within 90 days from the date of order.
- (iii) The parties are directed to settle the accounts after adjusting the total interest accrued.



34. The order is pronounced.
35. Case file be consigned to the registry.

**(Dr. K.K. Khandelwal)**  
Chairman

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.03.2019

Judgement Uploaded on 25.03.2019

