

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

Complaint no. : 798 of 2018
First date of hearing: 13.03.2019
Date of decision : 13.03.2019

1.Mr. Bhrigu Nagal
2. Mr. Balraj Singh Nagal
R/o B-104, Plot No.33, Sector-4, Dwarka, New
Delhi- 110078

Complainants

Versus

M/s Varali Properties Ltd.
(through its director)
Registered Office:
M-62 & 63 First Floor, Connaught
Place, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Ms Aditi Tripathi, proxy for Advocate for the complainant
Ms. Jaya Shahi
Mr. Rahul Yadav Advocate for the respondent



ORDER

1. A complaint dated 31.08.2018 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. Bhrigu

Nagal and Mr. Balraj Singh Nagal against the promoter, M/s Varali Properties in respect of flat described below in the project 'India Bulls Enigma', on account of violation clause 21 of the flat buyer's agreement dated 05.10.2013 in respect of unit no. D151, 15th floor with respect to super area of 3400 sq. ft. for not handing over possession on due date i.e. 05.03.2016 which is an obligation under section 11(4)(a) of Act *ibid*.

2. Since the flat buyer's agreement dated 05.10.2013 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 contractual obligation on the part of the respondent in terms of the provision 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	India Bulls Enigma
2.	Nature of the project	Residential complex
3.	RERA registered/ not registered.	351 of 2017
4.	Apartment/unit no.	D151, 15 floor, tower D
5.	Revised date of completion	30.08.2018
6.	Apartment measuring	3400 sq. ft.
7.	Payment plan	Subvention scheme payment plan



8.	Date of execution of flat buyer's agreement	05.10.2013
9.	Total consideration as alleged by the complainant as applicant ledger (Annx. 4)	Rs. 1,98,83,365/-
10.	Total amount paid by the complainant till date as per applicant ledger (Ann. 4)	Rs. 1,94,57,480/-
11.	Date of delivery of possession Clause 21 – 2 years plus 5-months grace period from the execution of flat buyer's agreement.	05.03.2016
12.	Delay in handing over the possession	3 years approx.
13.	Penalty clause (clause 22)	Rs. 5 per sq. ft. per month of the super area
14.	Occupation certificate	17.09.2018

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants and the respondents. A flat buyer's agreement dated 05.10.2013 is available on record, according to which the due of the date of possession is 05.03.2016 as per clause 21 of the said agreement which is the obligation of the promoter.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The



case came up on hearing on 13.03.2019. The reply filed on behalf of the respondent has been perused.

Facts of the case

6. The complainants submitted that they booked a residential flat in the project of the respondent namely “Indiabulls Enigma” at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon .
7. The complainants submitted that they were induced to sign flat buyer’s agreement dated 18.06.2012 and vide aforesaid flat buyer’s agreement the respondent allotted apartment bearing no. D-151 on 15th floor in tower no. D, admeasuring super area of 3400 sq. ft. to the complainants.
8. The complainants submitted that the Indiabulls Real Estate Ltd. executed a fresh flat buyer agreement. The new flat buyer agreement comprised of certain significant changes for example the name of the builder was changed from Athena to Varali properties Ltd. and time period for completing the construction was also revised. The complainants were informed by indiabulls real estate ltd. that tower D of the project shall be built by the respondent herein and therefore fresh BBA was being executed. The newly executed BBA did not alter with allotted unit no. and total sale consideration.



9. The complainants have paid a total sum of Rs. 1,89,47,146/- from January 2012 to December 2012 as and when demanded by the respondent. It is pertinent to mentioned that the complainants had made more than 90% payment to the respondent by December 2012. It is pertinent to mentioned that despite receiving such huge amount from the complainant the respondent has delayed in executing the flat buyer agreement and failed to offer timely possession of the booked flat to the complainants.
10. The complainant submitted that respondent had promised to complete the project within a period of 2 years from the date of execution of the buyer agreement with a further grace period of five months. The flat buyer's agreement was executed on 05.10.2013 and till date the construction is not complete. Furthermore, the respondent/ promoter had collected more than 95% of the sale consideration within three years of the booking and as such the gross delay in completion of the project is solely attributable to the respondent/ promoter.
11. The complainant submitted that the respondent has failed to complete the project in time, resulting in extreme mental distress, pain and agony to the complainants.



12. The complainant submitted that the project Indiabulls Enigma comprises of towers A to J. The tower D is to be developed by the respondent herein. The other towers i.e. A to C and E to J are being developed by another subsidiary of Indiabulls namely Athena Infrastructure Limited. It was presented to the complainants that towers A to D will have 17 floors. However, during the construction the respondent and athena 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.
13. The complainant 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 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.



14. The complainant submitted that respondent did not seek the consent of the complainants for increasing the floors and increased the floors in a secretive manner. It is stated that the enhancement of FAR is in total violation of representations made in the respondent's advertisement material displayed at site as well as on the internet.
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 complainant 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 complainant 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. There are various deviations from the initial representations. The respondent marketed luxury high end flats, 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 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. It is pertinent to mention that 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 07.03.2017 refunded the excess amount of Rs. 3,06,000/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,06,000/- which the respondent had illegally withheld for more than five years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax.

18. The complainant submitted that respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 05.10.2013 and the project was to be completed in 2 years with grace period of five months. The respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. The project has been inordinately delayed.

19. The complainants submitted that the respondent has not provided the complainants with status of the project. The complainants are entitled for interest @ 18% p.a. for every month of delay till the possession of the flat is handed over to the complainants, complete in all respects. The original date of



possession ought to be counted on expiry of two years from date of first payment.

Issues to be decided:

1. Whether the respondent/ promoter made false representations about the project in question in order to induce the complainant to make a booking?
2. Whether the respondent has unjustifiably delayed the construction and development of the project in question?
3. Whether the respondent/ promoter has over charged EDC, IDC?
4. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
5. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?

Relief sought:

In view of the facts mentioned above, the complainants prays for the following relief;

- a) Direct the respondents to award refund the amount paid by the complainant and 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;



- b) 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

20. The respondent submitted that the instant complaint is not maintainable, on facts or on law, and is as such liable to be dismissed at the threshold being in wrong provisions of the law. It is also submitted that the present complaint is devoid of any merits and had been preferred with sole motive to harass the respondents. In fact, the present complaint is liable to be dismissed on the ground that the complainants have chosen to file the instant complaint for adjudication of its grievances before the adjudicating officer under section 31 of the RERA Act, 2016. Thus, this hon'ble authority does have any jurisdiction to entertain the same and the complaint is liable to be dismissed.

21. The respondent submitted that the instant complaint filed by the complainants are outside the preview of this hon'ble authority, since as per clause 49 of the agreement duly executed between 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. Thus, the complainants are contractually and statutorily barred from invoking the jurisdiction of this hon'ble authority. Hence this authority has no jurisdiction to entertain the present complaint and decided the same and it should be dismissed on the above-mentioned ground alone.

22. The respondents submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact and law. The respondent deny them in toto. Is it submitted that instant complaint is devoid of any merits and has been preferred with the sole motive to extract monies from the respondents, hence the same is liable to be dismissed.
23. The respondent submitted that the relationship between the complainant and respondent is governed by the document executed between them. It is pertinent to mention herein that the instant complaint of the complainant is further falsifying his claim from the very facts that, the complainants has filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainant with malafide intention has not disclosed, infact concealed the material facts from this hon'ble authority that the complainant has been a willful defaulter since the beginning, not paying his



installments on time as per construction link plan opted by him. It is stated that the complainant has not come before this hon'ble authority with clean hands and wishes to take advantage of his own misdoing with the help of the provision on the RERA, which have been propagated for the benefit of innocent customers and not defaulter, like the complainant in the present complaint.

24. The respondent submitted that according to clause 22 of the FBA filed by the complainants along with their complaint . The respondent carves leave of this hon'ble authority to refer which is reproduced hereunder for ready reference:

Clause 22 in the eventuality of developer failing to offer the possession of the unit to buyer within the time 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 after understanding the terms and condition of the agreement. The complainants had voluntarily executed flat buyer's agreement with respondents on 13.03.2015 and it is specifically agreed that in the event of any dispute, the dispute shall be resolve through arbitration mechanism. Hence, this authority does not have the jurisdiction to entertain the same.



26. The respondents submitted that they have already completed the construction of tower D and also obtained OC for the concerned tower . It is also submitted that they are under the process of handing over of possession of the unit of the said tower including the unit of the complainant in question.
27. The respondents submitted that as per the FBA dated 18.06.2012, 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.
28. The respondent submitted that the complainants have made baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in the FBA. In view of the same, it is submitted that there is no cause of action in favor of the complainants to institute the present complaint.



Determination of issues

29. With respect to **first issue** the complainant has failed to produce any evidence in support of their allegation that promoter has made false representation about the project in question in order to induce the complainant to make a booking.

30. With respect to **second issue** 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 05.10.2013, the construction was to be completed within a period of 2 years with a grace period of 5 month. The due date of possession comes out to be 05.03.2016 which has already lapsed. However, the possession has not been delivered by the respondent till date which is in violation of section 11(4)(a). Thus, the complainant is entitled for interest on the delayed possession at the prescribed rate in terms of provision of as section 18(1) of the act the Act. Delay charges will accrue from the due date of possession i.e. 05.03.2016 till the offer of possession.

31. With respect to the **third issue**, as per clause 6(vii) of the buyer's agreement, the respondent can change revised EDC/IDC charges with retrospective effect as imposed by the central or state government or any other authority. The, EDC/IDC are charged as per the term of the agreement. The



agreement is executed before the coming into force of RERA Act, so the parties have fulfilled their contractual liabilities.

32. With respect to **fourth and fifth** these issues, as the increase in area is as per the clause 18 and 19 of the agreement executed between the parties and the complainant has failed to prove that the respondent has charged any excess with regard to increase in area. So, the issue decided in negative.

Findings of the authority

33. 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 14.12.2018 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.



34. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has observed that complainant booked a flat/unit No. D151, 15th Floor, tower-D, in project “Indiabulls Enigma”, Gurugram under the subvention scheme with the respondent against a total sale consideration of Rs.1,98,83,365/- out of which the complainant has so far paid an amount of Rs.1,94,57,480/-. By virtue of clause 21 of the BBA dated 50.10.2013 executed inter-se the parties, the respondent is/was obligated to hand over the physical possession of the booked flat/unit to the complainant. The respondent has offered the possession of the unit to the complainant on 2.1.2019.

35. It has been stated at bar by the counsel for the respondent that unit was purchased by the complainant under subvention scheme and the respondent has already paid an amount of Rs.21,96,052/- to the borrowed bank on behalf of the buyer. However, since the project has been delayed by 3 years 3 months. Both the parties are advised to settle the petty matters amicably



Decision and direction of authority

36. 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:

- i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 05.03.2016 till 02.01.2019 the date when the possession was offered by the respondent to the complainants, as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.
- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

37. The order is pronounced.

38. Case file be consigned to the registry.

HARERA
GURUGRAM



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated:13.03.2019

Judgement uploaded on 28.03.2019