

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

**Complaint no. : 1531 of
2018**
First date of hearing : 07.03.2019
Date of decision : 07.03.2019

Mrs. Neetu Chowdhary and Mr. Harish
Chandra
Both r/o 608, Sector 2, Urban Estate,
Kurukshetra.

..Complainants

Versus

M/s. Athena Infrastructure Ltd.
F-60, Malhotra building,
2nd floor, Cannaught place,
New Delhi.

...Respondent

CORAM:

Dr. K.K.Khandelwal
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Complainant in person with
Mr. Sanjeev Sharma
Mr. Rahul Yadav

Advocate for the complainant

Advocate for the respondent



ORDER

1. A complaint dated 30.10.2018 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. Neetu Chowdhary and Mr. Harish Chandra against the promoter M/s Athena Infrastructure Ltd. on account of violation of the clause 21 of the flat buyer's agreement executed on 02.05.2012 in respect of flat described below in the project 'Indiabulls Enigma' for not handing over 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 02.05.2012, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, 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 Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint are as under: -

i. Nature of the project- Residential

- ii. DTCP license no: 213 of 2007 dated 05.09.2007, 10 of 2011 dated 29.01.2011 and 64 of 2012 dated 20.06.2012**



1.	Name and location of the project	India bulls Enigma Sector 110, Gurugram
2.	Registered/Unregistered	Registered (346 of 2017)
3.	Revised date of completion as per RERA registration certificate	31.08.2018 Note: This has already expired.
4.	Payment plan	Construction linked
5.	Allotment letter	20.09.2011
6.	Date of agreement	02.05.2012
7.	Unit no.	C073, 7 th floor, tower C
8.	Area of unit	3400 sq. ft.
9.	Total consideration as per applicant ledger dated 13.08.2018	Rs. 1,92,45,000/-
10.	Total amount paid by the complainant as per applicant ledger dated 13.08.2018	Rs. 1,86,13,652/-
11.	Possession Clause 21 - 3 years plus 6 months grace period from the execution of flat buyers agreement	02.11.2015
12.	Penalty As per clause 22	Rs. 5/- per sq. ft. per month of the super area
13.	Delay till date	3 years 4 months 5 days



4. 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 apartment according to which the possession of the same was to be delivered by 02.11.2015. Neither the respondent has delivered the possession of the said unit till date to the complainant nor they have paid any compensation @ Rs.5/- per sq. ft. per month for the period of delay as per clause 22 of flat buyer's agreement dated 02.05.2012. Therefore, the promoter has not fulfilled his committed liability as on date.

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 on has been perused.



FACTS OF THE CASE:

6. That the respondent company M/s Athena Infrastructure Ltd. being the lawful owner in possession of land as prescribed in para A of the buyer agreement being total of 15.6 acres situated in Pawala Khusrupur Village, Tehsil and

District Gurgaon formulated and advertised a project of residential complex to be known as “Indiabulls Enigma” hereinafter referred to as the project.

7. That the complainants herein purchased a unit no. C073 on 7th floor in tower/block no. C admeasuring a super area of 3400 sq. ft. on the assurance that construction shall be complete in time and possession would be handed over in time. Allotment letter dated 20.09.2011 issued by the respondent with respect to the above said unit.
8. The flat buyer agreement dated 02.05.2012 is signed between both the parties i.e. the respondent and the complainant on the terms and conditions as laid down by the company as per which agreement unit no. C073 on 7th floor in tower/block no. C admeasuring a super area of 3400 sq. ft. was sold to the complainants for a total basic sale consideration of Rs. 1,72,60,000/- as also the complainants at the time of execution of the agreement paid a sum of Rs. 5,00,000/- to the respondent as booking amount. Further as per agreement it was also agreed PLC charges of Rs. 200 per sq. ft along with club house charges of Rs. 2,00,000/- and security deposit @



Rs. 100 per sq. ft. of the super area toward timely maintenance payments charges.

9. That it is must to mention here that as per the flat buyer agreement the possession of the unit in question was to be handed over within 36 months with a maximum grace period of 6 months from the date of the said agreement as provided under clause 21 of the agreement i.e. possession of the unit in question was to be handed over lastly by May 2015.
10. Though having paid the instalments as demanded the unit in question was far away from completion on the scheduled date of possession i.e. in May 2013. That the respondent though promising to handover the possession of the unit in question to the complainants in May 2015 failed to do so, aggrieved of which the complainants on numerous occasion visited/contacted the respondent as to know the status and date when the possession shall be given, however on each and every such instance the complainants were only given false assurance that the possession shall be given soon. Further the complainants also demanded interest on the delayed possession, however same was also done away by



the respondent with the assurance that the same shall be considered at the time of handing over of possession. That under such inducement the respondent till date has collected Rs. 1,86,13,652/- from the complainants. However till date the respondent have failed to offer possession of the unit in question.

11. That being aggrieved of the fact that the respondent caused exorbitant delay in handing over the possession of the unit in question to the complainant by almost 4 and a half years and now not offering any interest for the delayed possession, the complainant has approached this hon'ble authority.

ISSUES RAISED BY THE COMPLAINANTS:

12. The following issues have been raised by the complainants:
- Whether the respondent has unjustifiably delayed the construction and development of the project in question?
 - Whether the respondent is liable to pay the delay interest @18% p.a. along-with compensation till the time possession is handed over to the complainants?



- iii. Whether open parking space and parking in common basements be sold to the allottees as separate unit by the promoter?
- iv. Whether the respondent can legally sell super area instead of carpet area?

RELIEF SOUGHT BY THE COMPLAINANTS:

13. In view of the facts mentioned the following reliefs have been sought by the complainants:

- i. That the respondent/promoter be ordered to make refund of the excess amount collected on account of any area in excess of carpet area as the respondent has sold the super area to the complainant which also includes the common areas and which sale of common area is in total contradiction of the Act, for the reason as per the Act the monetary consideration can only be for the carpet area.
- ii. The respondent/promoter be ordered to make payment of interest accrued on amount collected by the respondent from the complainant, account of delayed



offer for possession and which interest should be @18% p.a. from the date as and when the amount was received by the respondent from the complainant.

- iii. Direct the respondent to refund the amount of GST service tax etc if collected from the complainant, which had to be paid by the complainant only for the reason of delayed offer of possession, as, if the offer of possession was given on time, then no question of GST service tax would have arise as on such date GST service tax was not in existence.
- iv. Any common area car parking including basement car park, which is not garage if sold than the money collected on such account shall be refunded along with interest
- v. That this hon'ble authority may direct the respondent to pay litigation cost @ Rs. 50,000/- to the complainant.



REPLY BY THE RESPONDENT:

14. The respondent submitted the fact that the instant complaint is not maintainable, on facts or 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 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

15. That the allegations made in the instant complaint are wrong, incorrect and baseless in the fact or 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.

16. The complainants are falsifying their claim from the very fact that there has been alleged delay in delivery of possession of



the booked unit however, that the complainants have filed the instant claim on the alleged delay in delivery of possession of the provisional booked unit. However, the complainants with nullified intention have not disclosed, in fact concealed the material facts from this hon'ble authority. The complainants have been willful defaulters from the beginning and not paying the instalments as per the payment plan.

17. The respondent submitted that it has already completed 95% of the construction of tower C and will be applying for grant of occupational certificate shortly and will hand over the possession of the unit in question to its respective buyers in short time of time. 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.

18. The respondent submitted that as per the flat buyers agreement dated 02.05.2012, 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 flat buyers agreement being referred to or looked into in this proceeding is an agreement executed much before the commencement of the Act.

19. 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 favour of the complainants to institute the present complaint.

DETERMINATION OF ISSUES:

20. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise



- i. With respect to the **first and second issue** raised by the complainants, the authority came across that as per clause 21 of the flat buyer's agreement; the possession of the said apartment was to be handed over within 3 years plus grace period of 6 months from the date of execution of apartment buyer's agreement. The agreement was executed on 02.05.2012. Therefore, the due date of possession shall be computed from 02.05.2012. The clause regarding the possession of the said unit is reproduced below:

“Clause 21: The developer shall endeavour to complete the construction of the said building within a period of three years, with a six months grace period from the date of execution of flat buyers agreement subject to timely payment..”

Accordingly, the due date of possession was 02.11.2015 and the possession has been delayed by approximately 3 years 04 month 5 days till date. 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. 02.11.2015 till date as per the provisions of



section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. Further, the respondent has admitted in para 8 of the reply submitted by him, that the construction of the said tower is 95% complete and will be applying for grant of occupation certificate shortly and will hand over the possession of the unit in question to respective buyers in a short span of time.

- ii. With respect to the **third issue** raised by the complainants, the authority is of the view that as per section 2(n) of the Act *ibid*, open parking spaces is covered under the definition common areas. Hence, respondent cannot sell the open parking space. Therefore, the respondent has illegally charged and sold the open parking spaces to the complainant and respondent is liable to refund the amount charged for the open parking space.

- iii. With respect to the **fourth issue** raised by the complainants, it is noted that the agreement is executed between the parties on 02.05.2012 i.e. prior to the



commencement of the Act *ibid*. This act does not apply retrospectively. Thus this issue is decided in negative.

FINDINGS OF THE AUTHORITY:

21. **Jurisdiction of the authority-** The project “Indiabulls Enigma” is located in Sector-110, Village Pawala Khusrupur, District Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction. The authority has complete 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 complainant at a later stage.

22. The complainants made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter.

23. 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 obligation.

24. By virtue of this complaint, the complainant is seeking directions against the respondent to refund the amount deposited with the respondent with interest for booking of flat/unit.

25. As per clause 21 of the builder buyer agreement dated 02.05.2012 for unit no C 073, 7th floor, tower C 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 02.11.2015. However, the respondent has not delivered the unit in time. Complainant has already paid Rs 1,86,13,652/- to the



respondent against a total sale consideration of Rs 1,92,45,000/-. The complainant is entitled for delayed possession charges as prescribed rate i.e. 10.75% per annum.

26. Counsel for the respondent submitted that tower in which the apartment of the complainant is situated is in advance stage of construction and is likely to be completed soon and offer of possession shall be given within 6 months after obtaining occupation certificate.

DECISION AND DIRECTIONS OF THE AUTHORITY:

27. 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:

- a. 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.



- b. The builder as well as buyer shall be equitable in charging interest @10.75% i.e. default of buyers in making late payment and delayed possession charges to be given by the respondent.
- c. The respondent is directed to pay interest accrued from 02.11.2015 to 07.03.2019 on account of delay in handing over of possession to the complainant within 90 days from the date of order.
- d. In case the respondent does not fulfil their commitments they are liable to be proceeded against for penal proceedings as well as complainant is at liberty to approach the authority for refund of amount along with interest.

28. The order is pronounced.

29. Case file be consigned to the registry.



(Dr K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Date: 07.03.2019

Judgement Uploaded on 28.03.2019