

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

Complaint no. : 2548 of 2018
First date of hearing: 28.03.2019
Date of decision : 28.03.2019

Mr. Ranvir Singh Chaudhary,

R/o Ranvir Hospital, Meham Road,
Meham Gate, Bhiwani,
(Haryana)-127021

Complainant

Versus

M/s. Athena Infrastructure Limited,

Registered office at
F-60, Molhotra Building, 2nd Floor,
Connaught Place, New Delhi-110001.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Arun Yadav Advocate for the complainant
Shri Rahul Yadav Advocate for the respondent

ORDER

1. A complaint dated 16.01.2019 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 complainants Mr. Ranvir Singh Chaudhary against the promoter, M/s Athena Infrastructure Ltd. in respect of apartment described below



in the project 'India Bulls Enigma', on account of violation clause 21 of the flat buyer's agreement dated 14.09.2011 in respect of unit no. B043, 4th floor with respect to super area of 2570.67 sq. ft. for not handing over possession on due date i.e. 14.03.2015 which is an obligation under section 11(4)(a) of Act *ibid*.

2. Since the flat buyer's agreement dated 14.09.2011 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	Indiabulls Enigma in sector 110, Gurugram
2.	Nature of the project	Residential complex
3.	RERA registered/ not registered.	Registered (354 of 2017)
4.	Apartment/unit no.	B043, 4 th floor, tower B
5.	Revised date of completion	30.09.2018
6.	Apartment measuring	2570.67 sq. ft.
7.	Payment plan	Construction linked payment plan
8.	Date of execution of flat buyer's agreement	14.09.2011
9.	Total consideration as applicant	Rs. 1,93,08,750/-



	ledger (Annx. P 3)	
10.	Total amount paid by the complainant till date as per applicant ledger (Ann. P3)	Rs.1,87,46,744 /-
11.	Due date of delivery of possession Clause 21 – 3 years plus 6 months grace period from the execution of flat buyer’s agreement.	14.03.2015
12.	Delay in handing over the possession	4 years 14 days approx.
13.	Penalty clause (clause 22)	Rs. 5 per sq. ft. per month of the super area for the period of delay

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’s agreement dated 14.09.2011 is available on record according to which the due of the date of possession was 14.03.2015 as per clause 21 of the said agreement. However, the respondent failed in handing over possession on or before said due date. Therefore, the promoter has not fulfilled his committed liability as no date.

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 28.03.2019. The reply has been filed by respondent and the same has been perused.



Facts of the complaint

6. The complainant submitted that representatives of the respondent followed up with him for advance registration of the upcoming real estate project “Indiabulls Enigma” in Sector-110, Gurugram, (Haryana). Representatives of the respondent made claims regarding the upcoming said project and reputation of M/s. Athena Infrastructure Limited. Thereafter, upon much persuasion from official/representatives of the respondent, complainant booked a flat in the project by the respondent at agreed total sale consideration of Rs.1,73,50,000/- . The complainant paid Rs.5,00,000/- as booking amount through cheque no.083450. After receipt of booking amount the respondent referred a flat/unit bearing no. B-043 in their project. It is pertinent to mention herein that separate allotment letter was issued to the complainant.
7. The complainant submitted that on 14.09.2011, flat buyer agreement was executed between the parties and the complainant/ petitioner was allotted unit no. B043, measuring 3350 sq. ft. approximately in the said project.



8. The complainant submitted that the total sale consideration of the flat is Rs.1,73,50,000/- for which the complainant has paid Rs.1,87,46,744/- till date. It is a matter of record that the complainant has paid instalments as per the demand raised by the respondent. The payment plan "Annexure-2" was construction linked and in absence of construction at the site, the respondent raised demand and complainant/petitioner paid the instalments. The petitioner was ready and willing and has resources to pay the balance amount if any, computed and found payable after taking into consideration the receivable by the petitioner.
9. The complainant submitted that the respondent had to handover the physical possession of the unit/flat to him within a period of three years from the date of execution of buyer's agreement dated 14.09.2011 with a further grace period of 6 month, i.e. on or before 13.03.2015 but not later than 13.03.2015. However, construction and development works have not even completed at the site even period of more than 3 years have been passed and grace period of 6 months have also been already passed. But the respondent is not in situation to hand over the possession of the flat/unit as



per their commitment within the aforesaid maximum period of 3 years and 6 months.

10. The complainant submitted that at the site, there is no development as per assurance, the project is far from completion and the complainant is suffering because of undue delay on the part of the respondent in handing over of the physical possession of the flat/unit.
11. The complainant submitted that the respondent has failed to abide by the contractual terms stipulated in the buyer's agreement and it is in breach. The cause of action to file the complaint is continuing as the respondent has failed to deliver possession of developed flat/unit.
12. The complainant submitted that he has diligently discharged all his obligations as per the flat buyer agreement, whereas, the respondent has failed to perform its obligations stipulated in the contract.
13. The complainant submitted that the respondent has failed to develop the project and is misusing unilateral and one-sided terms of the buyer's agreement to further harass the complainant. It is stated that as per clause no.11 of the



buyer's agreement stipulates for 18 % p.a. interest on delayed instalments compounded quarterly which is charged by the respondent and therefore, in terms of RERA, 2016 the complainant is also entitled to same rate of interest for delayed period in handing over of the physical possession of the flat a compounded interest as charged by the respondent.

14. The complainant submitted that the respondent has committed the violation of section 18 of the Act, 2016 and is liable to the complainant for delay in handing over the possession of the flat/unit in terms of section 1 along with the interest as claimed by the complainant.

15. The complainant submitted that clause 22 of the buyer's agreement inter alia, stipulates that the petitioner/complainant is entitled to charge Rs.5/- per square feet where colonizer/developer is made liable to pay for delay in handing over of possession of the unit/flat.

16. The complainant submitted that the project is "ongoing" and is subject to registration under section 3 and promoter should make an application and provide all the information for such registration under section 4. In case of non



registration of the project or the phase thereof, respondent has not only violated the provisions of section 3 & 4 of the Act but also has put to jeopardy rights of complainant under the Act, as, in case of non registration of such portion/part of the project, such above stated inadequacies and incomplete development works that are pending till date would lead to grave injustice and may deny or jeopardize enforcement of the rights of complainant.

Issues to be decided:

1. Whether the complainant is entitled for peaceful possession of the flat/unit along with interest @ 18 % per annum for the delayed period in handing over the possession from the stipulated period of 3 years and thereafter the period of 6 months grace period ?
2. Whether the respondent has failed to perform its promises made and obligations, and liable to be penalize and prosecuted under section 14 & 18 and provisions of the Act?
3. Whether the respondent is required to register the phase/project” “Indiabulls Enigma” Sector-110, Gurgaon,



Haryana in terms of section 3 and 4 of Real Estate (Regulation and Development) , Act, 2016.

4. Whether the respondent has violated the provisions of Section 3,4 and 14 of the Act and liable to be prosecuted and penalties be imposed under section 59,60 & 61 of the Act?

Relief sought:

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

- i. To direct the respondent to handover the peaceful possession of the flat/unit immediately along with penalty of Rs.5 per sq. feet along with interest @ 18 % per annum quarterly rests/compounded interest from the date of deposits till its actual realizations as the respondent failed to deliver the possession within the stipulated period as agreed.
- ii. To conduct such inquiry under Section 35 of the Act into the affairs of the respondent,
- iii. To pass such directions, as may be deemed fit and proper, under section 37 & 38 of the Act, towards giving effect to any one or more of the above sought reliefs.



- iv. Any other relief as this Hon'ble Authority may deem fit and appropriate in the facts and circumstances of the present case.

Respondent's reply

17. 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 complainant has 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.



18. The respondent submitted that the instant complaint filed by the complainant is 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 complainant, the same shall be adjudicated through arbitration mechanism. Thus, the complainant is 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.

19. 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. It is submitted that 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.
20. The respondent submitted that according to clause 22 of the FBA filed by the complainant 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

21. The respondent submitted that after understanding the terms and condition of the agreement, the complainant had voluntarily executed flat buyer agreement with respondents on 14.09.2011 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.

22. 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

23. The respondent submitted that they have already completed 95% the construction of tower B and would be applying for occupation certificate in short span of time. 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.

24. The respondent submitted that as per the FBA dated 14.09.2011, 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.

25. The respondent submitted that the complainant has 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 complainant to institute the present complaint.

Determination of issues

26. With respect to **first and second issue** as per clause 21 of the agreement dated 04.09.2011, the construction was to be completed within a period of 3 years with a grace period of 6 month from the execution of agreement. Hence, due date of possession comes out to be 04.03.2015 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 proviso to section 18(1) of the Act *ibid*. Delay



charges will accrue from the due date of possession i.e. 04.03.2015 till the offer of possession.

27. With respect to **third issue** raised by the complainant the project is already registered with the authority vide registration no. 351 of 2017.
28. With respect to **fourth issue** raised by the complainant, he has failed to prove that the respondent has not adhere to sanction plan and approval violated the provisions alleged by him. So the issue is decided in negative.

Findings of the authority

29. 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.

30. As per clause 21 of the builder buyer agreement dated 14.09.2011 for unit no. B 043, 4th floor , tower B, in the project “India Bulls Enigma”, Gurugram, possession was to be handed over to the complainant within a period of 3 years from the execution of BBA plus 6 months grace period which comes out to be 14.03.2015.

Decision and direction of authority

31. 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. 14.05.2015 till the date of offer of possession by the respondent to the complainant, as per the provisions of proviso 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 and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.



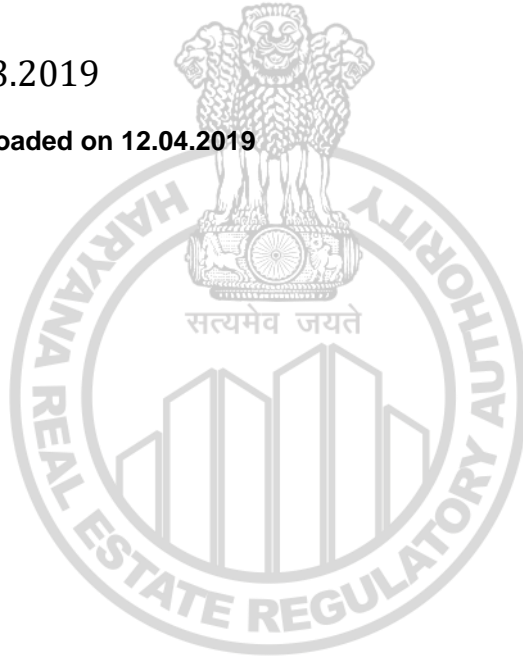
32. The order is pronounced.
33. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated:28.03.2019

Judgment uploaded on 12.04.2019



HARERA
GURUGRAM

