

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

Complaint no. : 551 of 2018
First date of hearing : 18.09.2018
Date of decision : 07.12.2018

Captain Manoj Kumar Agarwal & Anr
R/o 1042, Joy Apartments, Sector 2,
Plot-2, Dwarka, New Delhi-110075

..Complainants

Versus

M/s. Athena Infrastructure Ltd
M-62 & 63 First Floor, Connaught Place,
New Delhi-110001

...Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Vaibhav Suri
Shri Rahul Yadav

Advocate for the complainant
Advocate for the respondent



ORDER

1. A complaint dated 18.07.2018 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, Captain Manoj Kumar Agarwal & another against the promoter, M/s. Athena Infrastructure Ltd in respect of apartment/unit described below in the project 'India Bulls Enigma', on account of violation of the section 11 of the Act ibid.

2. Since, the buyer's agreement has been executed on 05.08.2011 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 are as under: -

- Nature of the project- Residential
- 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.	Nature of project	Residential
3.	Registered/Unregistered	Registered No. 351 of 2017
4.	HRERA registration certificate valid up to	30.08.2018
5.	Payment plan	Construction linked
6.	Date of agreement	05.08.2011
7.	Unit no.	A 112, 11 th floor, tower A
8.	Area of unit	3350 sq. ft.
9.	Total amount paid by the complainant	Rs 1,65,67,916/-
10.	Possession Clause 21 – 3 years plus 6-month grace period from the execution of flat buyer agreement.	05.02.2015
11.	Penalty as per clause 22	Rs. 5 per sq. ft. per month of the super area
12.	Delay till date	3 years 1 months 09 ²¹ days
13.	Occupation certificate	06.04.2018
14.	Offer of possession	03.07.2018 26.11.2018



Correction made vide order dated 16/01/2019

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

respondent has appeared on 07.12.2018 The reply has been filed on behalf of the respondent.

FACTS OF THE CASE:

5. That the complainants booked a residential flat in the project of the Respondent namely "India bulls Enigma" at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon
6. That the representatives of India bulls Real Estate Ltd. represented to the complainants that India bulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd.
7. That the complainants were induced to sign a pre-printed flat buyer agreement dated 05.08.2011. The respondent allotted flat bearing no. A-112 on 11th floor in tower no. A, admeasuring super area of 3350 sq. ft. to the complainants.
8. That the complainants have paid a total sum of Rs. 1,65,67,916/- towards the aforesaid residential flat in the project from 2011 to 2014 as and when demanded by the respondent. It is pertinent to state that the respondent collected more than 95% of the sale consideration by year 2014, which is





also in terms with the construction linked payment plan, however still the respondent/ promoter miserably failed to offer the possession of the flat in question till date despite delay of more than three years.

9. That the respondent had promised to complete the project within a period of 36 months from the date of execution of the builder buyer agreement with a further grace period of six months. The flat buyer's agreement was executed on 05.08.2011 and till date the construction is not complete

10. That the project India bulls Enigma comprises of towers A to J. The tower D is to be developed by another subsidiary of India bulls namely Varali Properties Ltd. The other towers i.e. A to C and E to J are being developed by respondent herein. It was presented to the complainant that towers A to D will have 17 floors. However, during the construction the respondent and varali 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.

11. 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.

12. The 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.

13. That the complainants 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.

14. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. 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 05.08.2016 adjusted the excess amount of Rs. 3,01,500/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,01,500/- which the respondent had illegally with held for more than two years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax.

15. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 05.08,2011 the project was to



be completed in 3 years with grace period of six 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.

16. That the respondent for a long time did not provide the complainants with status of the project. It is pertinent to mention that on 03.07.2018 the complainant received a letter from the respondent, wherein it is mentioned that the respondent has received occupation certificate for tower- 'A' from Director General, Town and Country Planning Department and is thereby offering possession to the complainants subject to complainants paying the balance sale consideration. The said demand letter is totally sham as it has been issued with ulterior motives to extract money. The project is totally incomplete and the promised amenities and facilities are missing.



ISSUES RAISED BY THE COMPLAINANTS:

17. The following issues have been raised by the complainant:



- i. Whether the respondent has unjustifiably delayed the construction and development of the project in question?
- ii. Whether the respondent is liable to pay the delay interest @18% p.a., w.e.f 05.02.2015 along-with compensation till the time possession is handed over to the complainant?
- iii. Whether the respondent has over charged EDC, IDC?
- iv. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
- v. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?



RELIEF SOUGHT BY THE COMPLAINANTS:

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

- i. Direct the respondent to award 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;
- ii. Direct the respondent to provide to rectify the breaches with regard to extra EDC /IDC charges, VAT, service tax as well as for wrongfully inflating the super area.
- iii. Direct the respondent to pay a sum of Rs. 50 lacs to the Complainant as compensation for making misrepresentations and giving false and incorrect statement at the time of booking;
- iv. Direct the respondents to pay a sum of Rs. 50,000/- to the Complainant towards the cost of the litigation;
- v. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.



REPLY BY THE RESPONDENT:

19. The respondent submitted the fact that the instant complaint is not maintainable, on facts of 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 complainant has chosen to file the instant complaint for adjudication of its grievances before the adjudicating officer under section 31 of the RERA, 2016. Thus, this hon'ble authority does have any jurisdiction to entertain the same and the complaint is liable to be dismissed

20. That the allegations made in the instant complaint are wrong, incorrect and baseless in the fact of 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.

21. 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 installments as per the payment plan.

22. The respondent submitted that they have already completed the construction of tower A and also obtained OC for the concerned tower and already initiated the process of handing over of possession of tower A to the respective buyers. 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.

23. The respondent submitted that as per the flat buyers agreement dated 21.02.2012, 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.

24. 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 flat buyers agreement. 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:

25. After considering the facts submitted by the complainants, reply by the respondents 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 apartment 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 buyers agreement. The agreement was executed on 05.08.2011. Therefore, the due date of



possession shall be computed from 05.08.2011. 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 05.02.2015 and the possession has been delayed by 3 years 11 months 6 days till the 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. 05.01.2015 till the offer of possession.

- ii. With respect to **issue no 3, 4 and 5** these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainant has only dealt these issues in the facts of the complaint and no documents have been annexed in respect of the same, thus issues cannot be determined.



FINDINGS OF THE AUTHORITY:

26. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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 complainant at a later stage.
27. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter.
28. The complainant 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.
29. It has been alleged by the counsel for the buyer-complainant that builder has offered him possession on 03.07.2018 and he has not resolved the matter w.r.t payment of delayed possession charges i.e. @ 10.75% as per the provisions of section 18 (1) of the Real Estate (Regulation and Development)





Act, 2016. The respondent has rather given him a ledger of account vide which he has adjusted only delayed possession charges as per BBA which is not reasonable and in accordance with law. The builder as well as buyer shall be equitable in charging interest @ 10.75% on both sides i.e. default of buyer to make payment and delayed possession charges.

30. Respondent has stated that he had already received occupation certificate on 06.04.2018 and he had sent possession letter to the buyer on 03.07.2018.

31. As per clause 21 of the flat buyer agreement dated 5.8.2011, for unit No.A112, 11th floor, tower-A in Indiabulls Enigma, Sector-110, 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 5.2.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,65,67,916/- with the respondent



DECISION AND DIRECTIONS OF THE AUTHORITY:

32. Thus, the authority exercising power under section 37 of Real Estate (Regulation & Development) Act, 2016 issue directions:



i. The respondent is directed to give the complainant delayed possession charges @ 10.75% per annum w.e.f 05.02.2015 till the date of offer of possession i.e. ~~03.07.2018~~ ^{26.11.2018} amounting to Rs ~~60,73,455/-~~ ^{67,81,412/-} as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 within 90 days from the date of this order. *Correction made vide order dated 16/01/2019.*

ii. The respondent is directed to act in accordance with the provisions of section 18 (1) of the Act ibid i.e. to adjust the amount @ 10.75% per annum i.e. delayed possession charges

33. The order is pronounced.

34. Case file be consigned to the registry.



(Samir Kumar)

Member

Date:07.12.2018

(Subhash Chander Kush)

Member

PROCEEDINGS OF THE DAY

Day and Date	Friday and 07.12.2018
Complaint No.	551/2018 Case titled as Captain Manoj Kumar Aggarwal & Anr V/S M/S Athena Infrastructure Ltd.
Complainant	Captain Manoj Kumar Aggarwal & Anr
Represented through	Shri Vaibhav Suri Advocate for the complainant.
Respondent	M/S Athena Infrastructure Ltd.
Respondent Represented through	Shri Rahul Yadav, Advocate for the complainant.
Last date of hearing	18.9.2018
Proceeding Recorded by	Naresh Kumari

Proceedings

Project is registered with the authority.

Arguments heard.

At the time of arguments, it has been alleged by the counsel for the buyer-complainant that builder has offered him possession on 3.7.2018 and he has not resolved the matter w.r.t payment of delayed possession charges i.e. @ 10.75% as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The respondent has rather given him a ledger of account vide which he has adjusted only delayed possession charges as per BBA which is not reasonable and in accordance with law. The builder as well as buyer shall be equitable in charging interest @ 10.75% on

both sides i.e. default of buyer to make payment and delayed possession charges.

Respondent has stated that he had already received occupation certificate on 6.4.2018 and he had sent possession letter to the buyer on 3.7.2018.

As per clause 21 of the Flat Buyer Agreement dated 5.8.2011, for unit No.A112, 11th floor, Tower-A in Indiabulls Enigma, Sector-110, 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 5.2.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,65,67,916/- with the respondent. As such, complainant is entitled for delayed possession charges @ 10.75% per annum w.e.f 5.2.2015 till the date of offer of possession i.e. 3.7.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016. The respondent is directed to act in accordance with the provisions of section 18 (1) of the Act ibid i.e. to adjust the amount @ 10.75% per annum i.e. delayed possession charges. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.

Complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)
7.12.2018

Subhash Chander Kush
(Member)
7.12.2018

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

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..Complainants

Versus

M/s. Athena Infrastructure Ltd
M-62 & 63 First Floor, Connaught Place,
New Delhi-110001

...Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Vaibhav Suri
Shri Rahul Yadav

Advocate for the complainant
Advocate for the respondent



ORDER

1. A complaint dated 18.07.2018 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, Captain Manoj Kumar Agarwal & another against the promoter, M/s. Athena Infrastructure Ltd in respect of apartment/unit described below in the project 'India Bulls Enigma', on account of violation of the section 11 of the Act ibid.

2. Since, the buyer's agreement has been executed on 05.08.2011 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 are as under: -

- **Nature of the project- Residential**
- **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.	Nature of project	Residential
3.	Registered/Unregistered	Registered No. 351 of 2017
4.	HRERA registration certificate valid up to	30.08.2018
5.	Payment plan	Construction linked
6.	Date of agreement	05.08.2011
7.	Unit no.	A 112, 11 th floor, tower A
8.	Area of unit	3350 sq. ft.
9.	Total amount paid by the complainant	Rs 1,65, 67,916/-
10.	Possession Clause 21 – 3 years plus 6-month grace period from the execution of flat buyer agreement.	05.02.2015
11.	Penalty as per clause 22	Rs. 5 per sq. ft. per month of the super area
12.	Delay till date	3 years 11 months 6 days
13.	Occupation certificate	06.04.2018
14.	Offer of possession	03.07.2018



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

respondent has appeared on 07.12.2018 The reply has been filed on behalf of the respondent.

FACTS OF THE CASE:

5. That the complainants booked a residential flat in the project of the Respondent namely "India bulls Enigma" at Sector 110, Gurgaon in Pawala Khusrupur Village, Gurgaon Tehsil, Gurgaon
6. That the representatives of India bulls Real Estate Ltd. represented to the complainants that India bulls is developing the above project through its 100% subsidiary Athena Infrastructure Ltd.
7. That the complainants were induced to sign a pre-printed flat buyer agreement dated 05.08.2011. The respondent allotted flat bearing no. A-112 on 11th floor in tower no. A, admeasuring super area of 3350 sq. ft. to the complainants.
8. That the complainants have paid a total sum of Rs. 1,65,67,916/- towards the aforesaid residential flat in the project from 2011 to 2014 as and when demanded by the respondent. It is pertinent to state that the respondent collected more than 95% of the sale consideration by year 2014, which is



also in terms with the construction linked payment plan, however still the respondent/ promoter miserably failed to offer the possession of the flat in question till date despite delay of more than three years.

9. That the respondent had promised to complete the project within a period of 36 months from the date of execution of the builder buyer agreement with a further grace period of six months. The flat buyer's agreement was executed on 05.08.2011 and till date the construction is not complete
10. That the project India bulls Enigma comprises of towers A to J. The tower D is to be developed by another subsidiary of India bulls namely Varali Properties Ltd. The other towers i.e. A to C and E to J are being developed by respondent herein. It was presented to the complainant that towers A to D will have 17 floors. However, during the construction the respondent and varali 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.

11. 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.

12. The 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.

13. That the complainants 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.

14. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. 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 05.08.2016 adjusted the excess amount of Rs. 3,01,500/-. The respondent did not pay any interest to the complainants on the amount of Rs. 3,01,500/- which the respondent had illegally with held for more than two years. The respondent further artificially inflated measurable super area and has also wrongfully charged service tax.

15. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The agreement was executed on 05.08.2011 the project was to



be completed in 3 years with grace period of six 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.

16. That the respondent for a long time did not provide the complainants with status of the project. It is pertinent to mention that on 03.07.2018 the complainant received a letter from the respondent, wherein it is mentioned that the respondent has received occupation certificate for tower- 'A' from Director General, Town and Country Planning Department and is thereby offering possession to the complainants subject to complainants paying the balance sale consideration. The said demand letter is totally sham as it has been issued with ulterior motives to extract money. The project is totally incomplete and the promised amenities and facilities are missing.



ISSUES RAISED BY THE COMPLAINANTS:

17. The following issues have been raised by the complainant:

- i. Whether the respondent has unjustifiably delayed the construction and development of the project in question?
- ii. Whether the respondent is liable to pay the delay interest @18% p.a., w.e.f 05.02.2015 along-with compensation till the time possession is handed over to the complainant?
- iii. Whether the respondent has over charged EDC, IDC?
- iv. Whether the respondent has wrongfully resorted to increase in floors/increase in FAR thereby changing the entire theme of the project?
- v. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?



RELIEF SOUGHT BY THE COMPLAINANTS:

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

- i. Direct the respondent to award 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;
- ii. Direct the respondent to provide to rectify the breaches with regard to extra EDC /IDC charges, VAT, service tax as well as for wrongfully inflating the super area.
- iii. Direct the respondent to pay a sum of Rs. 50 lacs to the Complainant as compensation for making misrepresentations and giving false and incorrect statement at the time of booking;
- iv. Direct the respondents to pay a sum of Rs. 50,000/- to the Complainant towards the cost of the litigation;
- v. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.



REPLY BY THE RESPONDENT:

19. The respondent submitted the fact that the instant complaint is not maintainable, on facts of 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 complainant has chosen to file the instant complaint for adjudication of its grievances before the adjudicating officer under section 31 of the RERA, 2016. Thus, this hon'ble authority does have any jurisdiction to entertain the same and the complaint is liable to be dismissed

20. That the allegations made in the instant complaint are wrong, incorrect and baseless in the fact of 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.

21. 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 installments as per the payment plan.

22. The respondent submitted that they have already completed the construction of tower A and also obtained OC for the concerned tower and already initiated the process of handing over of possession of tower A to the respective buyers. 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.

23. The respondent submitted that as per the flat buyers agreement dated 21.02.2012, 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.

24. 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 flat buyers agreement. 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:

25. After considering the facts submitted by the complainants, reply by the respondents 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 apartment 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 buyers agreement. The agreement was executed on 05.08.2011. Therefore, the due date of



possession shall be computed from 05.08.2011. 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 05.02.2015 and the possession has been delayed by 3 years 11 months 6 days till the 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. 05.01.2015 till the offer of possession.

- ii. With respect to **issue no 3, 4 and 5** these issues cannot be determined on account of lack of documentary proof on the part of complainant. The complainant has only dealt these issues in the facts of the complaint and no documents have been annexed in respect of the same, thus issues cannot be determined.



FINDINGS OF THE AUTHORITY:

26. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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 complainant at a later stage.
27. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter.
28. The complainant 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.
29. It has been alleged by the counsel for the buyer-complainant that builder has offered him possession on 03.07.2018 and he has not resolved the matter w.r.t payment of delayed possession charges i.e. @ 10.75% as per the provisions of section 18 (1) of the Real Estate (Regulation and Development)



Act, 2016. The respondent has rather given him a ledger of account vide which he has adjusted only delayed possession charges as per BBA which is not reasonable and in accordance with law. The builder as well as buyer shall be equitable in charging interest @ 10.75% on both sides i.e. default of buyer to make payment and delayed possession charges.

30. Respondent has stated that he had already received occupation certificate on 06.04.2018 and he had sent possession letter to the buyer on 03.07.2018.

31. As per clause 21 of the flat buyer agreement dated 5.8.2011, for unit No.A112, 11th floor, tower-A in Indiabulls Enigma, Sector-110, 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 5.2.2015. However, the respondent has not delivered the unit in time. Complainant has already deposited Rs.1,65,67,916/- with the respondent



DECISION AND DIRECTIONS OF THE AUTHORITY:

32. Thus, the authority exercising power under section 37 of Real Estate (Regulation & Development) Act, 2016 issue directions:

- i. The respondent is directed to give the complainant delayed possession charges @ 10.75% per annum w.e.f 05.02.2015 till the date of offer of possession i.e. 03.07.2018 amounting to Rs 60,73,465/- as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 within 90 days from the date of this order.
- ii. The respondent is directed to act in accordance with the provisions of section 18 (1) of the Act ibid i.e. to adjust the amount @ 10.75% per annum i.e. delayed possession charges
33. The order is pronounced.
34. Case file be consigned to the registry.



(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Date:07.12.2018

Judgement Uploaded on 05.01.2019