# One-sided clause in a builder buyer agreement to constitute unfair trade practices under Consumer Protection Act, 1986

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Real Estate sector has seen an imperative shift from the legal perspective post introduction of the Real Estate (Regulation and Development) Act, 2016 and the Insolvency and Bankruptcy Code, 2016. However the picture that still needed renovation was the builders acting untrammelled with the terms and conditions as used for entering into an agreement with the proposed purchaser.

Supreme Court in its recent judgement dealt with this issue of arbitrary provisions in the builder buyer agreement and declaring them as unfair trade practices under the law.

Facts

The builder Pioneer Urban Land & Infrastructure Limited ("Builder") launched a residential project in Gurgaon wherein Govindan Raghavan ("Flat Purchaser") purchased an apartment by entering into an Apartment buyer's agreement ("Agreement") dated 08.05.2012. As per clause 11.2 of the Agreement, the Builder was required to make all efforts to apply for the occupancy certificate for the project within 39 months from the date of excavation with a grace period of 180 days. However, the Builder failed to apply for the same and the Flat Purchaser filed a case against the Builder before the Hon'ble National Commission on January 27, 2017. The Flat Purchaser alleged deficiency of service on part of the Builder in applying for occupancy certificate and handing over the possession of the apartment to the Flat Purchaser. Therefore, the Flat Purchaser prayed for the refund of the entire amount as deposited with the Builder @ 18% interest along with the interest, compensation for mental agony and litigation costs.

In furtherance to this case, the Hon'ble National Commission passed an interim order dated February 06, 2017 ("Interim Order") of restraining the Builder from cancelling the allotment of the apartment as allotted to the Flat Purchaser. As the occupancy certificate was obtained while the case was pending before the Hon'ble National Commission, the Builder submitted that the Flat Purchaser should be directed to take possession of the flat instead of being directed to refund the amount, which was clearly denied by the Flat Purchaser.

The National Commission vide its final judgement dated October 23, 2018 ("Judgement") passed the order in favour of the Flat Purchaser directing the Builder to provide refund at the rate of 10.7% p.a. in accordance with Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.However,

no
interest was awarded for the period when the Interim Order was passed.
The Builder being aggrieved by the Judgement filed an appeal before the Hon’ble Supreme Court (“Supreme Court/Court”).

Issues

Whether the Judgement by the Hon’ble National Commission was right?

Contentions

Builder: The Builder submitted
that Clause 11.5 of the Agreement clearly provided the Flat Purchaser with the
right to terminate the Agreement in case of delay in handing over the possession even after 12 months from the end of grace period, by giving a notice of 90 days and obtaining a refund of the amount so deposited with the Builder along with interest @9%p.a. The Clause also stated that in case the intended allottee failed to exercise the abovementioned right of termination, it shall be bound by the provision of the Agreement. Further, Clause 20 of the
Agreement that dealt with right of cancellation by the allottee also stated that in case the in case of clear and unambiguous failure of the warranties of
the Builder that leads to frustration of the Agreement, Flat Purchaser shall have the right to cancel the Agreement. Upon cancellation, the Flat Purchaser shall be entitled to refund of the instalments actually paid along with interest at 6% p.a. Further, no claim against the Builder of whatsoever nature
could be raised by the Flat Purchaser. Therefore, the Builder submitted that the Flat Purchaser was not entitled to the refund as the rights provided to them under the Agreement were not duly exercised.

Flat Purchaser: It was contended by
the Flat Purchaser that the clauses of the Agreement were one-sided. As per the
Agreement, Builder could charge interest at 18% for delayed payment, however the Flat Purchaser could only get a maximum of 9% interest rate for termination
of the agreement due to delay by the Builder. Further, Flat Purchaser informed
the Court about an alternate flat bough by it due to inordinate delay by the Builder and the bank loan as obtained by it for the purpose of purchase of the
flat by the Builder.

Judgement

The Hon’ble Supreme Court upon hearing the contentions of both the parties was of the view that the Builder had failed in handing over the possession of the flat to the Flat Purchaser within a reasonable period. Further the Court referred to the case of Lucknow Development Authority v M. K Gupta[wherein the Court concluded that the inordinate delay in handing over the possession of the flat clearly amounts to deficiency of service under the Consumer Protection Act, 1986 (“Act”). Further the Court stated that a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him, along with compensation.[1]

The Court placed reliance on the clauses of the Agreement as was practiced by the Builder during the submission of their contentions, and stated that "*the Agreement reveals stark incongruities between the remedies available to both the parties*". The Court referred to the 199th Report of the Law Commission of India on 'Unfair (Procedural & Substantive) Terms in Contract" wherein it was stated that "*A contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties*".

While perusing the Agreement, Court referred to few such clauses as suggestive comparison for unfair trade practices, namely:

1. Interest Rate: Clause 6.4(ii) of the Agreement entitles the Builder to charge interest @18%p.a. on account of delay in payment of instalments by the Flat Purchaser, however as per Clause 11.5 of the Agreement the Builder was only liable to refund the amount along with interest @ 9% p.a. in case case of delay in providing possession of the flat and the Flat Purchaser terminating the agreement by giving 90 days termination notice.
2. Time Period: Clause 6.4(iii) of the Agreement entitles the Builder to cancel the allotment and terminate the Agreement if any instalment remains in arrears for more than 30 days, however as per Clause 11.5 the right to terminate the Agreement is provided to the Flat Purchaser only after delay in handing over the possession even after 12 months from the end of grace period. Further, the Builder gets 90 days of termination notice period and 90 days of period for refund which seems to be clearly missing for the Flat Purchaser.
3. Forfeiting the amount: Clause 23.4 of the Agreement provides the Builder the right to serve a termination notice upon the Flat Purchaser for breach of any contractual obligation. In case of failure to rectify the breach/default within 30 days, the Agreement automatically stands cancelled and the Builder has the right to forfeit the amount so deposited by the Flat Purchaser. However, as per clause 11.5(v) if the Flat Purchaser fails to exercise his right to termination within stipulated time, then the Flat Purchaser shall have no right of termination thereafter and shall be bound by the provisions of the Agreement.

The Court clarified that Clause 2(r) of the Act is illustrative in nature and not exhaustive. Further Court referred to the case of Central Inland Water Transport Corporation Limited and Ors v Brojo Nath Ganguly and Ors[ wherein this very Hon'ble Court had held that an attempt to give illustrations can be made but no exhaustive list can be provided. However, the Court provided the basic guideline stating that it will apply to situations in which the weaker

party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. Further the Court stated that it will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be.

Upon perusal of the above case, the Court was of the view that a term of contract shall not be considered final and binding if it is shown that the Flat Purchaser had no option but to sign on the dotted line, on a contract framed as per the comfort of the Builder.

The Builder could not bind the Flat Purchaser with such blinded contractual terms which were adopted as unfair methods or practices for the sole purpose of selling the flats by the Builder. The Appeal was therefore rightly dismissed by the Hon'ble Court.

Conclusion

We observe that the Hon'Ble Court has taken up a constructive interpretation of the law by not restricting itself to the definition of unfair trade practices as provided under the Act, but analysing it as an illustrative definition to cover situations where such helpless Flat Purchasers could be provided with a remedy against such deficient service being provided to them. Further, the judgement comes as a great relief to the public at large due to increase in the investment in the real estate industry but lack of diligence by the Builder in providing the promised flat/apartments to the purchaser at the right time irrespective of all the financial troubles that the purchaser has to go through. This judgement would hopefully create the necessary and much needed deterrence among the builders with laid back attitude in standing by their own promises.

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[1] Fortune Infrastructure & Anr v Trevor D'Lima & Ors[

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