

**BEFORE S.C. GOYAL, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM**

Complaint Case No. : 1462/2019

Date of Decision : 04.10.2019

**Mr. Sandeep Tyagi & Mr Anil Kumar Tyagi
Flat No.139, Sector 19, Pocket 3,
Akshardham Apartment, Dwarka,
New Delhi-1110075**

Complainants

Versus

**M/s Sidhartha Buildhome Pvt Ltd.
Plot No.6, 5th Floor, Sector 44,
Gurugram**

Respondent

APPEARANCE:

For Complainants

For Respondent

Shri Sukhbir Yadav, Advocate

Shri Prashant Sheoran, Advocate

ORDER

This is a complaint filed under Section 31(1) of Real Estate(Regulation and Development) Act, 2016(hereinafter referred to as "Act" read with rule 29 of Haryana Real Estate(Regulation and Development) Rules, 2017(hereinafter referred to as the "Rules" against M/s Sidhartha Buildhome Pvt Ltd. in respect of Flat No. A 704, 7th floor, Tower-A, measuring 1910 sq. ft, allotted to the complainants by the respondent/promoter vide its allotment letter dated 20.10.2011 on account of violation of the obligations under section 11(4)(a) of that Act.

Shri Sandeep Tyagi
4/10/19

Before processing further, a brief reference to the details of the project and its location is a must and which is as under:

1.	Name and location of the project	"Estella", Sector-103, Gurugram
2.	Nature of the project	Residential group housing project
3.	Project area	15.743 acres
4.	RERA Registered/ not registered.	Not registered
5.	DTCP License no.	17 of 2011 dated 08.03.2011
6.	Allotment letter	21.10.2011 (as per annexure P2, pg. no. 25)
7.	Apartment/unit no.	A-704, 7 th Floor, Tower A
8.	Unit measuring	1910 sq. ft.
9.	Date of execution of apartment buyer's agreement	19.07.2012 Annexure P3, Page 26
10.	Payment plan	Construction linked payment plan Page 35 of complaint
11.	Total consideration (as per statement of account dated 31.08.2017)	Rs.70,23,370/- (page 77 of complaint)Annexure P1
12.	Total amount paid by the complainants till date as per statement of account dated 31.08.2017	Rs.68,79,582/- (page 77 of complaint)
13.	Environment clearance granted on	20.02.2015-Annexure R-2
14.	Date of delivery of possession as per clause 12.1 of apartment buyer's agreement(Annexure P-2)s (36 months + grace period of 6 months, which shall be intimated to the buyer(s) from the date of receipt of all statutory approvals)	20.08.2018 Note: Due date calculated from Environment Clearance i.e. 20.02.2015.
15.	Delay in handing over possession till date of decision	8 months 3 days
16.	Penalty clause as per the said apartment buyer's agreement(Annexure P-2)	Clause 13.1 of the agreement i.e. Rs.5/- per sq. ft. of the super area of the apartment per month for the period of delay.

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2. It is the case of the complainants that as per BBA dated 19.07.2012 Annexure P-3 executed between the predecessor of the complainants and respondent, the possession of the allotted dwelling unit was to be delivered to them within a period of 36 months+six months of grace period. However, despite numerous visits and writing to the respondent, it failed to deliver the possession of that dwelling unit and are being harassed unnecessarily and mentally tortured. Even there is a unfair trade practice and breach of contract by the respondent. So, on these broad averments, the complainants sought refund of the amount deposited by them with the respondent with regard to dwelling unit allotted besides interest, compensation and other charges.

3. But the case of the respondent as set up in the reply is that though the complainants were allotted dwelling unit in question in its project known as "Estella" and have paid the amount as mentioned in the statement of account but the construction of the project is at an advanced stage. It was pleaded that the structure of various towers has already been completed and the remaining work is being completed as soon as possible. It was pleaded though some allottees committed default in making payment of instalments but despite that the respondent is soon going to complete the project. It has also taken shelter under clause 12(1) of the BBA which provides for date of allotment to be reckoned from the date of signing of documents but from the approvals against the project granted by the competent authority. Moreover, the respondent applied for environment clearance for the project in the year 2011 and despite its best efforts and persuasions, it could only be obtained on 20.02.2015. Lastly, it was pleaded that the project in which the dwelling unit of the complainant is located is likely to be completed soon as is evident from photographs

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Annexures R-3 to R-5 placed on record. It was denied that there is in any way delay in completing the project and the respondent is at fault in any manner.

4. To decide the rival contentions raised by the parties, following issues arise for consideration:

- i) Whether the respondent/developer violated the terms and conditions of BBA?
- ii) Whether there was any reasonable justification in delay to offer the possession of allotted unit to the complainants?
- iii) Whether the complainants are entitled for refund of the amount paid besides interest, compensation and other charges?

5. During the pendency of the complaint pending before the Ld. Authority, a Local Commission was appointed who visited the spot and gave its report dated 12.04.2019 and which is also being taken on record to decide the controversy between the parties.

6. I have heard the learned for both the parties and perused the case file.

7. Some of the admitted facts of the case are that the predecessor of the complainants ~~were~~ allotted Unit No. A-704, 7th floor, Tower-A, measuring 1910 sq. ft. by the respondent vide letter of allotment Annexure P-2 for a sum of Rs.70,23,370/-. Later on, the complainants were transferred that flat on 19.11.2012 by the respondent vide letter Annexure P-4. It is also a fact that upto 31.08.2017, the complainants paid a sum of Rs.68,79,582/- to the respondent as per Annexure P-2. The unit of the complainants was allotted under the "Construction Linked Plan" as is evident from the

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Apartment Buyer Agreement, Annexure P-3 at Page 35. So, in this way, the complainants have already deposited a sum of more than 95% and only a sum of less than one lakh remains to be paid to the respondent. It is a case of the complainants that as per terms of the BBA Annexure P-3, the possession of the allotted unit was to be delivered to them within a period of 36 months from the date of execution of BBA with a further grace period of six months and that period has admittedly expired. Now, the plea of the complainants is that a period of more than three years has already expired and till now neither the project is complete nor they have been offered possession of the unit allotted. Even from a perusal of the report of Local Commission dated 12.04.2019, it is evident that the overall progress of the project is 40 to 50% only. Similarly, the tower in which the unit of the complainant is situated is having work progress of 50% and their dwelling unit is completed upto 55% to 60%. So, in such a situation, when they have already been deposited their hard-earned money with the respondent in the hope that they would get their dream dwelling unit to live in and there is delay in completing the construction, they be allowed to refund the amount deposited with the respondent besides interest, compensation and other charges.

8. But on the other hand, it is the case of the respondent that though the complainants deposited a sum of Rs.68,795,82/- on different dates but the possession of the same could not be delivered to them for the reasons not in its control. Firstly, it was pleaded that some of the allottees of the project have not deposited the due instalments in time leading to delay in the completion of the project. Secondly, the respondent applied for Environment Clearance of the project in the year 2011 and the same was not granted and it could only be obtained only on 20.02.2015 as is evident from documents annexure R-II. So, as per clause 12(1) of the BBA

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Annexure P-3, the period of 36 months and six months grace period would be counted from 02.02.2015 and not from the date of signing of BBA. Then, it is pleaded that the project in which the unit of the complainants is situated is at advanced stage as is evident from photographs Annexure P-3, R-4 and R-5. Even that fact is corroborated from the report of the Local Commission dated 12.04.2019 where it is mentioned that where the unit of the complainant is located is complete upto 60%. The possession of the same would be delivered to them and other allottees of that project by the middle of next year. A reference in this regard has also been made to ratio of law laid down in case of **Ms Savita Sharma Vs M/s Sidhartha Build Home Pvt Ltd.** complaint case No.1159/2018 decided on 14.02.2019 by the learned Authority, Gurugram wherein the refund of the deposited amount was declined to the allottee and interest on delayed possession at the prescribed rate was only allowed.

9. It is not disputed that the complainants are the allottees of dwelling unit in the project of the respondent known as "Estella" situated in Sector 103, Gurugram. It is also a fact that they have already deposited a sum of Rs.68,79,582/- as evident from annexure P.11 with the respondent on the basis of construction linked plan. Only the last instalment of the total amount of the price fixed for the dwelling unit for a sum of Rupees less than two lakhs is to be paid. The only plea taken on behalf of the respondent is that the project where the unit of the complainants is located/situated, construction could not be completed due to non-payment of instalments due by other allottees and secondly, due to non-clearance of the project by the competent authority i.e. State Environment Impact Assessment Authority, Haryana. It is also pleaded that the project is at an advanced stage as is evident from the photographs Annexure R-3 to R-5

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and the report of the Local Commission dt 12.04.2019 and the possession to the complainant of their unit would be offered by middle of the year i.e. 2020. But all the pleas taken in this regard are devoid of merit. Though the respondent has taken shelter under clause 12 of the BBA Annexure P-3 but admittedly, the complainants were allotted a dwelling unit in the project which has a construction linked plan. If the respondent did not receive the Environmental Clearance for its project from the State Environment Impact Assessment Authority, Haryana for a period of more than four years after launching its project in the year 2011, then why it continued receiving payments from the complainants and other allottees of that project. It should have deferred the payments from the allottees of their respective units till the receipt of Environment Clearance. Though the respondent has taken shelter under clause 12 of BBA, Annexure P-3 but whether the same is binding on the complainants. The answer is in the negative. In case of Central Inland Water Transport Corporation & Ors Vs Brozo a Nath Ganguly & Ors (1986) 3 SCC 156, a similar situation arise as in the instant case and wherein the Hon'ble apex court of the land observed as under:

"..... Our judges are bound by their oath to 'uphold the Constitution and the laws'. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonsable contract, or an unfair and unreasonable clause in a contract, entered into between parties, who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can, visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the

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parties or not. It will apply to situations 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. 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. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction

These cases can neither be enumerated nor fully illustrated. This court must judge each case on its own facts and circumstances".

Similarly in case of *Fortune Infrastructure & Anr Vs Trevor D'Lima & Ors(2018) 5,SCC 442*, it was held by the Hon'ble apex court of the land that a person cannot be made to wait indefinitely for possession of the plot/flat allotted to him and he is entitled to seek refund of the amount paid by him alongwith compensation.

10. Lastly, in case of Pioneer Urban Land Infrastructures Ltd Vs Govindan Raghav in Civil Appeal No.12238/2018 decided on 02.04.2019, the Hon'ble apex court of the land held that the terms of contract will not be final and binding if it shows that purchasers had no option but to sign on the dotted lines on a contract framed by the builders. The contractual terms of Annexure P-3 are one sided and unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes unfair trade practice as per section 2 (r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling flats/plots by the builders. So, in such a situation, the respondent/promoter cannot seek to bind the complainants with such one sided contractual terms.

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11. Though, it is pleaded on behalf of the respondent that the project where the unit of the complainants is located is almost complete and the possession of the same would be offered to them in the middle of the year 2020 but no such plea was taken while filing reply. Though an effort in this regard was made by getting appointed a Local Commission from the Ld Authority but that does not also help it in any way. A perusal of the Local Commissioner's report dated 12.4.2019 shows that the project is not going to be completed soon. It is relevant to produce the conclusion arrived at by the Local Commission which is as under:

"The project to be developed by Sidhartha Buildhome is physically inspected, it is observed that around 40-50 labour were working on site and the work progress is based upon actual construction at site and it is submitted that The overall progress of the project is 45-50 per cent only. The work progress in tower A is 50-50 per cent only. The work progress of complainant unit is approximately 55-60 per cent only.

Sd/- 12.04.2019
Engineer Executive

12. Moreover, a perusal of the photographs produced with the report of Local Commissioner as well as already annexed with the reply as R-3 to R-5 shows the structure of the project and of the actual/inside position of the dwelling units allotted to the complainants.

13. Though a reference has been made to the case of Ms. Savita Sharma Vs M/s Sidhartha Build Home Pvt Ltd.(supra) but that matter was also decided by the learned Authority more than 7 months back and as per the averments of the respondent, the project should have been completed by now. However, during the course of arguments, it is pleaded that completion of the project would take almost a year. So, in such a situation, the allottees who have already deposited 90% of the total amount cannot be allowed to wait indefinitely for getting possession of their dream houses. When the respondent has failed to fulfil its contractual

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obligations to obtain occupation certificate and offering possession of the flat/unit to the complainants within the time stipulated in the builder buyer agreement or within a reasonable time thereafter, then the later cannot be compelled to wait indefinitely and that too after the expiry of grace period. Hence, findings of issue I and II are returned accordingly against the respondent.

14. Thus, in view of discussion above and taking into consideration of the material facts brought out on record by both the parties, issue no. III is held in favour of the complainants. Consequently, the following directions are hereby issued to the respondent:

(i) To refund the entire amount of Rs.68,97,582/- alongwith interest at the prescribed rate of interest i.e. 10.35% p.a. from the date of each payment till the date of full return of amount to them.

ii) The respondent shall also pay Rs.50,000/- to the complainants as compensation for mental agony and harassment undergone by them which includes a sum of Rs.10,000/- as costs of litigation.

13. The payments in terms of this order shall be made by the respondent to the complainants within a period of 90 days from today.

14. Hence, in view of discussion detailed above, complaint stands disposed of accordingly.

(S. C. Goyal)

ADJUCATING OFFICER

HARYANA REAL ESTATE REGULATORY AUTHORITY

GURUGRAM

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