



HARYANA REAL ESTATE REGULATORY AUTHORITY  
GURUGRAM

हरियाणा भू-संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

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

**Complaint No. : 233/2018  
Date of Decision : 08.11.2019**

**Shri Arun Singla  
R/o A/7/14, Mianwali Nagar, Paschim Vihar  
NEW DLEHI-110087**

**Complainant**

**V/s**

**M/s Almond Infrabuild Pvt Ltd.  
711/92, Deepali, Nehru Place,  
New Delhi-110019**

**Respondent**

**Argued by:**

**For Complainant**

**Mr. Gaurav Bhardwaj, Advocate**

**For Respondent**

**Mr. M. K. Dang, Advocate**

**ORDER**

This is a complaint under section 31 of the Real Estate(Regulation and Development) Act, 2016 (hereinafter referred to Act of 2016) read with rule 29 of the Haryana Real Estate(Regulation and Development) Rules, 2017(hereinafter referred as the Rules of 2017) filed by Shri Arun Singla for refund of amount deposited with the respondent for booking of a flat in its project known as "Tourmaline" in Sector 109-B, Gurugram measuring 2159 sq.ft. bearing No. 4092, 9<sup>th</sup> Floor in Tower 4 for

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a sum of Rs. 1,75,20,000/-on account of violation of obligations of the promoter under section11(4)(a) of Real Estate(Regulation and Development) Act, 2016. Before taking up the case of the complainant, reproduction of the following details is must and which are as under:

<b>Project related details</b>		
I.	Name of the project	Tourmaline" in Sector 109-B, Gurugram
II.	Location of the project	Sector-109-B,Gurgaon, Haryana
III.	Nature of the project	Residential (construction link plan)
<b>Unit related details</b>		
IV.	Unit No. / Plot No.	<b>4092 9<sup>th</sup> Floor,</b>
V.	Tower No. / Block No.	Tower 4
VI	Size of the unit (super area)	2150 sq.ft
VII	Size of the unit (carpet area)	-DO-
VIII	Ratio of carpet area and super area	-DO-
IX	Category of the unit/ plot	Residential
X	Date of booking	
XI	Date of execution of BBA (copy of BBA be enclosed as annexure 1)	05.10.2013
XII	Due date of possession as per BBA	05.04.2017
XIII	Delay in handing over possession till date	More than 2 years
XIV	Penalty to be paid by the respondent in case of delay of handing over possession as per the said BBA	As per clause 6.3 of BBA

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Payment details		
XV	Total sale consideration	Rs.1,75,20,000/-
XVI	Total amount paid by the complainant till date	Rs. 1,66,40,150/-.

2. It is the case of the complainant relying upon advertisements in various newspapers as well as electronic media for the project of respondent known as "Tourmaline" in Sector 109-B, Gurugram, booked the above mentioned flat measuring 2150 sq ft for total sale consideration of Rs.1,75,20,000/- inclusive of BSP, car parking, IFMS, club membership, PLC etc. on 05.10.2013 and made a first payment of Rs. 10,00,000/- vide cheque No.256225 dated 14.04.2013 to the respondent towards booking amount. A BBA(annexure C-3) dated 05.10.2013 was executed between the parties and as per the same, the project was to be completed by the respondent within a period of 42 months from the date of execution of the BBA i.e. upto 05.04.2017. It is the case of the complainant that he paid a sum of Rs.1,66,40,150/- to the respondent and the remaining amount was to be paid as per instalments as the project was having construction linked plan. The respondent failed to perform its part of the contract and to complete the project on time. When despite a number of reminders, the respondent failed to complete the project, the complainant was left with no other alternative but to seek refund of the amount deposited with it besides interest and other charges.

3. But the case of the respondent as set up in the reply dated 25.09.2017 is that though the complainant booked a flat in its project known by the name of "Tourmaline" but the Apartment Buyer's Agreement was executed between the parties prior to the enactment of the Real Estate(Regulation

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and Development ) Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively. Further, the amended complaint is not maintainable for the reason that the agreement contains arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute. It is further stated that clause 6.2 of the BBA "The developer endeavour to complete the construction of the apartment within 42 months from the date of this agreement and the respondent would send possession notice and offer possession of the apartment to the complainant as and when the respondent receives the occupation certificate from the competent authority(s). It is further the case of the respondent that project was badly affected on account of a restrain order dated 23.04.2014 passed by the SDM, Kapashera(Delhi) on the basis of a report submitted by the Halka Patwari, Kapashera on the averments that the respondent was making encroachment on the Gram Sabha Land. The order passed by SDM, Kapashera is covered under the ambit of the definition of "Force Majeure Event". As soon as the retrain order dated 23.04.2014 was set aside, the respondent completed the construction and applied for occupation certificate and got the same on 09.08.2019. So accordingly, it offered possession of the apartment to the complainant on 09.08.2019. Thus, the complainant is bound to take possession of the booked unit by making remaining payment and is not entitled to seek refund of the amount deposited with it.

4. All other averments taken in the complaint were denied in toto.

5. It is not disputed that earlier, the complaint filed by the complainant was adjudicated by the learned Authority and who vide order dated 06.12.2018 allowed the same and held the handing over the possession of the unit as 05.04.2017 being delayed and allowed interest qua the delayed possession. Aggrieved by that order, the respondent filed an appeal before

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the Hon'ble Appellate Tribunal and who vide orders dated 25.07.2019 allowed the same and set-aside the orders dated 06.12,2018 passed by the learned Authority and remanded the matter for fresh decision by this forum. This is how the complaint is being dealt with afresh.

6. To decide the rival pleas, following issues arose for consideration:

I) Whether the respondent/developer violated the terms and conditions of the Builder Buyer Agreement?

II) Whether there was any reasonable justification for delay to offer the possession of the allotted unit?

III) Whether the claimant is entitled for refund of paid amount?

7. I have heard the learned counsel for both the parties and have also perused the case file.

8. Some of the admitted facts of the case are that the complainant booked a residential unit measuring 2150 sq ft with the respondent in its project 'Tourmaline' situated in Sector 109-B, Gurugram, Haryana on 05.10.2013 for a total sale consideration of Rs.1,75,20,000/-. An Apartment Buyer Agreement(Annexure C-3) was executed between the parties on 05.10.2013 and the possession of the allotted unit was to be delivered to the allottee within a period of 42 months from the date of that agreement as is evident from clause 6.2 of that document. It is a fact that the complainant was allotted a residential unit under the construction linked plan and he deposited different amounts with the respondent totalling to Rs.1,66,40,150/- upto June, 2016. It is the case of the complainant that he booked a unit with the respondent with the hope to get its possession within a stipulated period. But despite waiting for more than two years after June, 2016, the respondent failed to deliver its possession leading to frustration.

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Thus, it is contended on behalf of the complainant that when the respondent/builder failed to honour its commitment to complete the project and deliver possession of the allotted unit within the stipulated period, then he is entitled to seek refund of the amount already deposited with the respondent besides interest and compensation. Reliance in this regard has been placed on the ratio of law laid down in cases of **Pioneer Urban Land & Infrastructure Ltd. Vs Govindan Raghvan Civil Appeal No.12238 of 2018 decided on 02.04.2019 by the Hon'ble apex court.** **Shalabh Nigam Vs Orris Infrastructure Pvt Ltd and Anr in Consumer Case No. 1702/2016 decided on 06.05.2019 by Hon'ble National Consumer Disputes Redressal Commission, New Delhi and Marvel Omega Builders Pvt Ltd and Anr. Vs Shrihari Gokhale and Anr in Civil Appeal No.3207-3208 of 2019 decided on 30.07.2019** by the Hon'ble apex court of the land and wherein it was held that when the respondent/builder failed to complete the project in time and deliver the possession of the allotted unit to the complainant as per allotment letter or the apartment buyer agreement, then the allottee has a right to ask for refund if the possession is inordinately delayed. Thus, it is contended on behalf of the complainant that in case in hand, there is a delay of more than two years in delivering the possession of the allotted unit by the respondent to the complainant. So, in such a situation, the complainant is entitled to seek refund of the amount deposited with the respondent besides interest and compensation.

9. But on the other hand, it is contended on behalf of the respondent that though there is a delay in completion of the project in which the complainant was allotted a unit but that was due to a number of factors, such as, delayed payments, non receipt of various sanctions from the competent authorities and the restraint order passed by the SDM, Kapashera, New Delhi. The tower

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in which the complainant was allotted the unit is complete and he has already been offered possession after receipt of occupation certificate dated 09.08.2019(Annexure R-7). Even the complainant has been informed about the same by issuance of a notice. Lastly, the project in which the complainant was allotted a residential unit is registered with the Haryana Real Estate Regulatory Authority, Gurugram as is evident from (Annexure R-11) and that certificate is valid for six years w.e.f. 10.08.2017 when he has already been offered possession of the allotted unit and the order of restraint dated 23.04.2014 annexure R-2 is covered by the term Force Majeure, the intervening period between 23.04.2014 to 12.10.2017 be excluded in order to calculate time period qua completion of the project. A reference in this case has been made to the ratio of law laid down in cases of Ghaziabad Development Authority Vs Narendra Kumar Jain 2012(2) CPJ 149 and M/s Gautam Ferro Alloys Vs Damodar Valley Corporation 2018(4) JCR 351 and wherein it was held that award of compensation on account of non-construction of direct approach road in justifying that housing board was prevented from constructing approach road because of stay order of Allahabad High Court. Lastly, it has also been argued that the complainant executed the Apartment buyer agreement on 05.10.2013 out of his free will and consent and he cannot now challenge it and the courts should be very slow to doubt the genuineness of such a contract. Reliance in this regard has been placed on the ratio of law laid down in cases of Karambir Nain and Anr Vs The State of Haryana and Ors-2014(4)PLR 167, S. Deivanai and Ors Vs V M Kothandaraman and Ors 2017(4) CTC 734, M/s D K Construction Vs Arup Banerjee & Ors 2017 NCJ 500, Naresh Kumar Vs Pritam Singh & Ors 2017(4) RCR(Civil) 983 wherein it was held that once an agreement is reduced to writing, it shall be binding on the parties to the agreement and

no party has any right to relieve itself of its contractual obligations

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unilaterally. Thus, argued the learned counsel for the respondent that complainant has already been issued a letter of possession of the allotted unit and he be directed to take its possession on payment of amount due and is not entitled to any interest of delayed possession and compensation.

10. A Apartment Buyers' Agreement was executed between the parties on 05.10.2013 with regard to allotted unit measuring 2150 sq. ft. costing a sum of Rs.1,75,20,000/-. The complainant paid a sum of Rs.1,06,40,150/- to the respondent upto June, 2016. As per clause 6.2 of the BBA, the possession of the allotted unit was to be delivered within a period of 42 months which comes to 05.04.2017. However, the possession of the allotted unit to the complainant was not given by the respondent and the same was offered after receipt of occupation certificate on 09.08.2019(AnnexureR-7). Thus, admittedly, there is a delay of more then one year in offering possession of the allotted unit to the complainant. It is contended on behalf of the complainant by relying upon three cases(supra) that there is delay of more than one year in offering possession of the allotted unit and the complainant is entitled to seek refund of the amount deposited with the respondent and cannot be forced to take possession. No doubt, there is delay of more then one year in offering possession of the allotted unit to the complainant by the respondent but whether refund in such cases can be ordered or not: the answer is in the negative. It is not disputed that the tower in which the complainant was allotted the residential unit is complete and its possession has already been offered to various allottees including the complainant. Secondly, the Act of 2016 provides for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building as the case may be. If, in case, as the present one, refund of the deposited amount is allowed, then the same would be detrimental for the growth of the real estate sector and which is not the object of Real Estate(Regulation and

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Development) Act, 2016. Though the learned counsel for the complainant referred to a number of cases decided by the Hon'ble apex court of the land as well as National Consumer Disputes Redressal Commission but in those cases, the complainants sought only refund of the deposited amount besides interest but in the case in hand the respondent has already been offered possession of the allotted unit to the complainant even before amended complaint was filed before this forum on the directions of the Hon'ble Appellate Tribunal. The plea on behalf of the respondent is that due some orders, the construction work of the allotted unit as well as its tower could not be completed and referred to a number of cases. But the plea advance in this regard is devoid of merit. Firstly, there was dispute with regard to boundary only between the two states and no restraint order for stoppage of construction activities in the tower in which the unit of the complainant was situated was passed. Secondly, the complainant was allotted a unit under the construction linked plan. He has been making payment continuously even despite passage of restraint order by SDM, Kapashera, New Delhi. There is nothing on the record to suggest that during the period of restraint, the respondent wrote any letter to the complainant for not depositing any amount against the allotted unit. Moreover, the order dated 23.04.2014 passed by SDM, Kapashera, New Delhi and later on vacated in the year 2017 cannot be said to be covered by the term 'force majeure'. Admittedly, apartment buyer agreement was entered into way back on 05.10.2013 and order of SDM, Kapashera and subsequently order of the Hon'ble High Court of Delhi were passed on 23.04.2014 and 12.10.2017 respectively. So these cannot be construed to be any of substantial reason and definitely not 'force majeure' conditions.

11. The contention of the respondent that there is in ordinary delay in payment of instalments by the complainant of the allotted unit and that was

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also the reason for delayed possession. But the plea advanced in this regard is devoid of merit. A perusal of the case file shows that upto 2016, complainant deposited a total sum of Rs.1,66,40,150/- against the total sale consideration of Rs.1,75,20,000/- and only a part of that was to be deposited by the complainant. The construction of the tower in which the unit of the complainant was allotted was complete as per the occupation certificate only in August, 2019. So, it cannot be said that there was any delay in making payment against the allotted unit.

12. Lastly, it is pleaded on behalf of the respondent that apartment buyer agreement dated 05.10.2013 was executed by the complainant out of his free will and consent and so, the court should be very slow to interfere in its genuineness. But again the plea taken in this regard is devoid of merit. In case of Central Inland Water Transport Corporation Limited and Ors Vs Brojo Nath Ganguly and Ors(1986) 3SCC 156, it was observed by the Hon'ble apex court 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 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*

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*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".* It was also observed in case Pioneer Urban Land & Infrastructure Ltd Vs Govindan Raghvan(supra) in Civil Appeal No.12238 of 2018 decided on 02.04.2019 by the Hon'ble apex court of the land that the terms of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted lines on a contract framed by the builder. The contractual terms of agreement dated 05.10.2013 are ex-facie one-sided, unfair and unreasonable. The incorporation of such one-sided clause as mentioned above in an agreement constitutes an 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 the flats/plots by the builder. So, in such a situation, the respondent/promoter can not seek to bind the complainant with such one-sided contractual terms

13. Thus, in view of my discussion above and taking into consideration all the material facts brought on record by both the parties, it is held that though there is delay in offering possession of the allotted unit by the respondent to the complainant but the former is not entitled to claim back refund of the amount deposited with the respondent particularly when its possession has already been offered to him. So, he is directed to take possession of the allotted unit from the respondent on deposit of the remaining amount due besides interest @ 10.25%p.a. from the date the same became due upto the date of actual demand. Similarly, It is also directed that the respondent is also liable to pay interest to the complainant on delayed possession of the allotted unit @ 10.25% p.a. w.e.f. 05.04.2017 till the date of offer of possession i.e. 09.08.2019.

The payment in terms of this order shall be made within a period of 90 days from the date of this order failing which legal consequences would

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follow. The respondent shall also liable to pay a sum of Rs.10,000/- to the complainant as litigation expenses.

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

15. Let the file be consigned to the Registry.

**Dated: 08.11.2019**

*Shree A*  
(S.C. Goyal)  
Adjudicating Officer,  
Haryana Real Estate Regulatory Authority  
Gurugram  
8.11.2019