



Modification of Builder Buyer Agreement by Competition Commission:

Shift Towards an Equitable Builder-Buyer Contractual Regime?

Surabhi Bhola

With rapid growth of the real estate sector many unresolved problems are also being faced by the buyers. Many times buyers have questioned the terms imposed by the builders under the buyer's agreement as being unfair and unreasonable. Imposition of such unfair terms by builder under the buyer's agreement for allotment and sale of apartment in the project was questioned by the buyers before CCI in the BOA Case.

Competition Commission of India ('CCI') in its order dated 12.08.2011 had found the abuse of dominant position by builder in the matter of Belaire Owner's Association v DLF Limited and others ("BOA Case") indicating its annoyance against builders imposing unfair terms and conditions under the buyers agreement., directing the builder to cease and desist from formulating and imposing such unfair conditions on the buyers under buyer's agreement and suitably modify such unfair terms of the buyer's agreement. However, in the appeal preferred by the builder before the Competition Appellate Tribunal (COMPAT) against the said order dated 12.08.2011, COMPAT vide its order dated 29.03.2012 directed CCI to pass an order specifying the

extent and manner in which the terms of the buyer's agreement needs to be modified. As per the directions of COMPAT, CCI vide its supplementary order dated 03.01.2013 provided for the draft clauses that may be substituted in place of the unfair terms in the buyer's agreement taking note of and relying on various provisions of Haryana Development and Regulation of Urban Areas Act, 1975 (Act of 1975), Haryana Development and Regulation of Urban Area Rules, 1976 (Rules of 1976), Haryana Apartment Ownership Act, 1983 (Act of 1983) with the rules and the Haryana Urban Development Authority (Erection of Buildings) Regulations, 1979 (Regulations of 1979).

RIGHTS OF BUYERS IN THE COMMON AREAS AND FACILITIES OF THE COMPLEX

Discussing the issue of rights of buyers in the common areas and facilities of the complex, CCI noted that the title, rights and interests of the buyer was limited only in the apartment and proportionate right in the land beneath and no ownership rights in the land and common areas were granted to the buyers. CCI observed that since, the costs are paid by buyers on per square feet basis of super area and the buyers are liable to make payment of any

central / state taxes in respect of the land, the buyers in the complex jointly become owner of the entire land and that the land and the common facilities belong exclusively to the buyers. However, the ownership of buyers in the land and the common facilities is indivisible.

WHETHER THE PARKING SPACE FORMS THE PART OF COMMON AREAS?

Further clarifying the issue, whether the parking space forms the part of common areas, CCI clarified that open parking and stilt parking are part of the common areas of the complex. However, CCI has allowed the builder to continue with the right to charge extra fees for allocation of additional parking spaces in the complex. CCI has also recommended a change to the effect that the parking area allotted to the buyer for his exclusive use forms integral part of the apartment and thus, the buyer is restricted from transferring the parking spaces independent of the apartment.

BUILDER'S 'SOLE DISCRETION' TO EFFECT CHANGES IN LAYOUT, NUMBER, FLOOR OF THE APARTMENT CURTAILED

CCI under its order made noting of another important aspect in the buyer's agreement, i.e. right of the builder to vary the area of apartment leading to changes in layout,

number, floor and other components of the apartment / complex. CCI noted that the right reserved by the builder in this respect is the unilateral right to be exercised by the builder, at its sole discretion. Recording its reasons, CCI approved that there can be a minor variation, of upto 2%, in super area of the apartment agreed to be sold to the buyer. But CCI insisted on taking consent of the buyers where the substantial changes are to be made in the plans resulting in variation of super area of more than 2%. CCI further observed that, since, any major variation in super area would also lead to variation in price of the apartment, the builder is required to give relevant information to the buyer as to how the super area has changed / varied.

CONCEPT OF EARNEST MONEY CLARIFIED

To bring more clarity to concept of earnest money in respect of which builder's have formulated their own terms, CCI has recommended that the earnest money should not include any of the components such as preferential location charges, brokerage etc. But CCI has provided for forfeiture of earnest money by the builder and has listed the eventualities in which forfeiture of earnest money can happen which includes termination of agreement by the buyer provided such termination is not caused due to default or breach of the builder, and failure of buyer in making payments for three consecutive stages of construction despite having being issued a notice in this regard.

INCREASE IN LEVIES/CHARGES AND BUYER'S LIABILITY

Many times buyers argue over their liability of making payments of enhanced prices in respect of their apartments where such enhancement is mandated due to increase in levies/charges of the authorities in respect of the complex. Timely payment of such charges is always necessary for the builder to ensure that the development works of complex are not obstructed. Thus, saving the builders from suffering any negative effects caused by burnt increase and/or untimely payment of such levies /

VOICE



KUSHAGR ANSAL
Director, Ansal Housing & Construction Limited

'CCI's suggested modifications in the Buyer's Agreement only apply to the specific project under consideration. The Order does not mandate that the model Buyer's Agreement is applicable on all projects pan-India or be binding on other developers. No

doubt it is important to protect the interests and rights of buyers. However, protection of developers' interests is closely tied to consumer protection.

It is important to point out that the real estate sector is very sensitive to even minor fluctuations in the economy. Further, the sector has not yet been given the status of an industry, making it very difficult for developers to arrange financing for projects from banks and other lenders. Large-scale investments made by speculators only compound the problems of financing. Then there is the lengthy process for obtaining sanctions and approvals in the absence of a single-window clearance authority, involving much red-tapism. In order for developers to undertake construction and achieve completion of projects within timelines stipulated in Buyer's Agreement, we need measures that recognize these ground realities."

It is evident that recommendations made by CCI cater to the requirements of both the builder and buyer and make the buyer's agreement more compliant to the applicable laws. It is pertinent to note that CCI's order and COMPAT's directions in BOA Case has been followed by filing of more complaints in respect of other projects most of which have been dismissed by CCI on the grounds that the respondent builder is not in a dominant position which makes it clear that for CCI to go into the terms of agreement and analyze whether they are unfair, unreasonable or one sided it is necessary to establish that the builder is in the dominant position.

charges such as external development charges and all other charges as levied by the authorities, CCI has proposed that the total price of apartment payable by the buyer will be escalation free except increase by the authorities of any of the charges levied by it such as external development charges etc. However, for raising the demand of such increased amount, the builder has to provide to the buyer relevant notification / order / rule / regulation to that effect along with the demand letter.

INTERLINKING OF PROJECTS

Further observing the practice by builders of interlinking their one project with the other CCI has said that builders can interlink the projects for the purposes of ingress and egress from the project. CCI has also mentioned that interlinking of the projects should not adversely affect the rights of the buyers.

PAYMENT OF HOLDING CHARGES

Settling the issue of liability payment of holding charges of the buyer where buyer refuses to takeover possession based on grounds attributable to the builder, CCI has recommended that responsibility to fulfill any provisions, formalities and documentation will be that of the builder and the builder will keep the buyer indemnified in respect of the same.

However, as and when possession of apartment is offered to the buyer, the buyer shall take over the same within the stipulated period. In case the buyer fails to take over the possession of apartment as stipulated, then the builder will be entitled to cancel the agreement provided that builder has condoned the delay by buyer subject to buyer paying the charges for such period. But in case the buyer fails to fulfill the prescribed condition within three months from the date of intimation by the builder of taking over possession of the apartment the builder can exercise the option of cancelling the agreement and forfeiting the earnest money.

Other recommendations by CCI under its order are in reference of default on part of

VOICE



SUNIL TYAGI

Senior Partner, ZEUS Law Associates

In its Order, CCI has analyzed provisions of the Buyer's Agreement under contention. The amendments proposed by CCI, while neutralizing skewed provisions, have also sought to strike a balance between protecting the interests and rights of both buyers as well as builders.

Other recent developments also suggest a perceptible shift towards an equitable builder-buyer contractual regime in the real estate sector as a


the builder, equitable penalties for buyer as well as builder, rights in community buildings and re-creational centers, conveyance of the apartment right to transfer ownership, exit by the buyer from project etc.

CONCLUSION

Thus, it is evident that recommendations made by CCI cater to the requirements of both the builder and buyer and make the buyer's agreement more compliant to the applicable laws. It is pertinent to note that CCI's order and COMPAT's directions in BOA Case has been followed by filing of more complaints in respect of other projects most of which have been dismissed by CCI on the grounds that the respondent builder

whole. Most importantly, the proposed Real Estate (Regulation and Development) Bill mandates developers to make prior disclosure to prospective customers about crucial details of their project - in both their advertising material as well as Buyer's Agreement (e.g. title of land, clearances and licenses obtained, area and specifications of the property to be constructed, timelines for construction, to name a few). Industry associations too are recognizing the need for proper disclosures and voluntary adoption of best practices by developers vis-à-vis real estate investors. In this respect, CREDAI has in place a model 'Code of Conduct' for its developer members.

No doubt CCI's Order is a progressive step and highlights the need felt for a more transparent and equitable regime in the real estate sector. However, as this CCI Order is applicable only to the specific case and parties involved, widespread change at the industry level will be better achieved by adopting and implementing measures that address concerns of all stakeholders involved.

is not in a dominant position which makes it clear that for CCI to go into the terms of agreement and analyze whether they are unfair, unreasonable or one sided it is necessary to establish that the builder is in the dominant position. Nonetheless many builders whose agreements and mode of working are based on the similar style are already looking upto the proposed model of buyer's agreement to figure out the list of dos and donts, yet the jury is still out, whether others will follow suit or not. 

ABOUT AUTHOR

Surabhi is Senior Associate with ZEUS Law Associates, Delhi.