

Advantage Consumer

Monthly News Letter of Consumer Protection Council, Rourkela

"An aware consumer is an asset to the nation"

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Queries & Answers through the Web

(www.advantageconsumer.com) is the website of Consumer Protection Council, Rourkela. One of the major attractions of the website is that a visitor can ask queries on issues relating to consumer protection. Answers to these queries are made free of cost, by the Chief Mentor of the Council, Sri B. Vaidyanathan.)

Continued from June, 2025 issue.....

Implication of Earnest Money in a contract explained and the Unfair contract, as per Consumer Protection Act, elucidated.

IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO.3334 OF 2023

GODREJ PROJECTS DEVELOPMENT
LIMITED

.....APPELLANT(S)

VERSUS

ANIL KARLEKAR & ORS.

.....RESPONDENT(S)

JUDGMENT

B.R.GAVAI,J.

Developer to the Buyer, sent through cheque/demand draft by registered post acknowledgement due or by courier at the address of the Buyer mentioned herein, shall be full and final satisfaction and settlement of all claims of the Buyer under this Agreement, irrespective of whether the Buyer accepts/encashes the said cheque/demand draft or not. There after the Buyer shall cease to have any interest or claim on the said Apartment and the proportionate undivided interest in the Common Areas and Facilities and Limited Common Areas and Facilities whatsoever or howsoever. The Developer thereafter shall be entitled to sell the said Apartment along with undivided interest in the Common Areas and Facilities and Limited Common Areas and Facilities to any prospective buyer/third party of its choice."

23. If we consider the obligations of the Developer in the event it does not comply with the timelines, a very meager compensation is provided to the Apartment purchaser. Not only that clause 4.2 of the Agreement, which provides that the Apartment shall be ready for occupation within 42 months from the date of issuance of Allotment Letter, also provides that the Developer would be entitled for a grace period of 6 months over and

above this 42 months' period. The said clause 4.2 further provides for various eventualities in case of which the Developer would be entitled to further extension of period for handing over the possession.

24. In any case, clause 4.3 of the Agreement provides that, subject to the provisions of clause 4.2 of the Agreement, if the Developer fails or neglects to issue the Possession Notice on or before the Tentative Completion Date and/or on such date as may be extended by mutual consent of the Parties, the Developer shall be liable to pay to the Buyer a meager compensation for such a delay at the rate of Rs.5/- per month per square feet of the Super Built Up Area of the Apartment.
25. It can thus be seen that the Agreement is one-sided and totally tilted in favour of the Developer.
26. In the case of ***Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another***, this Court, by taking recourse to Article 14 of the Constitution of India, has held that the courts will not enforce an unfair and unreasonable contract or an unfair and unreasonable clause in a contract, entered into between Parties who are not equal in bargaining power. It will be relevant to refer to the following observations of this Court in the said case:

"89.....We have a constitution for our country. 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 the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down a nun fair and unreasonable contract, or a nun fair 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 one illustration. 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 the weaker party is in a position in which he can obtain goods or services or means of livelihood only up and 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 contractor 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."

27. This Court in the case of *Pioneer Urban Land and Infrastructure Limited*(supra)was considering similar clauses in an Agreement between a Developer and an Apartment Purchaser. This Court observed thus:

"6.4. A perusal of the apartment buyer's agreement dated 8-5-2012 reveals stark incongruities between the remedies available to both the parties. For instance, Clause 6.4(ii) of the agreement entitles the appellant builder to charge interest @18% p.a. on account of any delay in payment of installments from the respondent flat purchaser. Clause 6.4(iii) of the agreement entitles the appellant builder to cancel the allotment and terminate the agreement, if any installment remains in arrears for more than 30 days. On the other hand, as per Clause 11.5 of the agreement, if the appellant builder fails to deliver possession of the apartment within the stipulated period, the respondent flat purchaser has to wait for a period of 12months after the end of the grace period, before serving a termination notice of 90days on the appellant builder, and even thereafter, the appellant builder gets 90 days to refund only the actual installment paid by the respondent flat purchaser, after adjusting the taxes paid, interest and penalty on delayed payments. In case of any delay thereafter, the appellantbuilderisliabletopayinterest@9% p.a. only.

6.5. Another instance is Clause 23.4 of the agreement which entitles the appellant builder to serve a termination notice upon the respondent flat purchaser for breach of any contractual obligation. If the respondent flat purchaser fails to rectify the default within 30 days of the termination notice, then the agreement automatically stands cancelled, and the appellant builder has the right to forfeit the entire amount of earnest money towards liquidated damages. On the other hand, as per Clause 11.5(v) of the agreement, if the respondent flat purchaser fails to exercise his right of termination within the time limit provided in Clause 11.5, then he shall not be entitled to terminate the agreement thereafter, and shall be bound by the provisions of the agreement.

6.6. Section2(1)(r) of the Consumer Protection Act, 1986 defines "unfair trade practices" in the follo wing words:

"2.(1)(r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.", and includes any of the practices enumerated therein. The provision is illustrative, and not exhaustive.

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6.8. A term 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 line, on a contract framed by the builder. The contractual terms of theagreementdated8- 5-2012 are ex facie one-sided, unfair and unreasonable. The incorporation of such one- sided clauses in an agreement constitutes an unfair trade practice as per Section 2(1)(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder.

7. In view of the above discussion, we have no hesitation in holding that the terms of the apartment buyer's agreement dated 8-5-2012 were wholly one-sided and unfair to the respondent flat purchaser. The appellant builder could not seek to bind the respondent with such one-sided contractual terms."

28. The view taken by this Court in the case of ***Pioneer Urban Land and Infrastructure Limited*** (supra) was followed in the case of ***Wing Commander Arifur Rahman Khan and Aleya Sultana and others v. DLF Southern Homes Private Limited (Now Known as Begur OMR Homes Private Limited) and others***.
29. Further, a three-judge Bench of this Court in the case of ***Ireo Grace Realtech Private Limited***(supra) approved the legal position as laid down in the case of ***Pioneer Urban Land and Infrastructure Limited***(supra).
30. It is further to be noted that when the cases of ***Pioneer Urban Land and Infrastructure Limited*** (supra), ***Wing Commander Arifur Rahman Khan and Aleya Sultana and others*** (supra) and ***I reo Grace Realtech Private Limited***(supra) were decided, they were decided based on the provisions of the Consumer Protection Act, 1986. Relying on the provisions of Section 2(1)(r) of the Consumer Protection Act, 1986, which defines the term "unfair trade practice", this Court held that the contractual terms which are *ex facie* one-sided, unfair and unreasonable would constitute unfair trade practice as per the aforesaid definition of "unfair trade practice".
31. Now, Parliament in 2019 has enacted the Consumer Protection Act, 2019, which has specifically provided a definition for "unfair contract". It will be apposite to refer to the relevant part of clause (46) of Section 2 of the Consumer Protection Act, 2019, which reads thus:
 2. Definitions. - In this Act, unless the context otherwise requires, -

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(46) "unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely: -

- (i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or
- (ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or

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(vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage;"

32. No doubt that the aforesaid definition would be applicable after the Consumer Protection Act, 2019 came into effect, however, even prior to that while considering the term "unfair trade practice", this Court has found that such one-sided Agreements, as in the present case, would be covered by the definition of term "unfair trade practice".
33. Insofar as the judgment in the case of ***Satish Batra*** (supra) is concerned, the clause providing for "forfeiture of earnest money deposit" cannot be said to be one-sided. It will be relevant to refer to the term which fell for consideration before this Court in the aforesaid case, which reads thus:

"(e) If the prospective purchaser fails to fulfill the above condition, the transaction shall stand cancelled and earnest money will be forfeited. In case I fail to complete the transaction as stipulated above, the purchaser will get double the amount of the earnest money. In both conditions, the dealer will get 4% commission from the faulting party."

34. It can thus be seen that in the aforesaid case though the term in the Agreement provided for forfeiture of the Earnest money in the event the prospective purchaser fails to fulfill the conditions, it also provided for payment of double the amount of earnest money by the vendor to the purchaser in case the vendor fails to complete the transaction. As such, the said term cannot be said to be one-sided.
35. Similarly, in the case of ***Desh Raj and others*** (supra), this Court was considering an Agreement to Sell with respect to the landed property. A perusal of the judgment would reveal that it was a case of an Agreement between two equal Parties and there are no terms in the Agreement which could be said to be one-sided and tilted to tally in favor of one of the Parties.
36. We are, therefore, of the view that the present case would not be governed by the law laid down by this Court in the cases of ***Satish Batra*** (supra) and ***Desh Raj and others*** (supra), but would be governed by the law as laid down in the cases of ***Pioneer Urban Land and Infrastructure Limited*** (supra), ***Wing Commander Arifur Rahman Khan and Aleya Sultana and others*** (supra) and ***Ireo Grace Realtech Private Limited*** (supra).
37. It will further be relevant to refer to the following observations by a Bench consisting of three learned Judges of this Court in the case of ***Maula Buxv. Union of India***:
5. Forfeiture of earnest money under a contract for sale of property -Movable or immovable -If the amount is reasonable, does not fall within Section 74. That has been decided in several cases: *Chiranjit Singh v. Har Swarup*; *Roshan Lal v. Delhi Cloth and General Mills Company Ltd. Delhi* [1910SCCOnLineAll98:ILR (1911)33All166] ; *Mohd Habib ullahv. Mohd Shafi* [1919SCCOnLine All87 : ILR 41All 324] ;*Bishan Chand v. Radhakishan Das.* [1897SCCOnLineAll52:ILR(1897)19All 490] These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty. Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."
38. It can be seen that this Court has held that if the forfeiture of earnest money under a contract is reasonable, then it does not fall within Section 74 of the Indian Contract Act, 1872, in as much as, such a forfeiture does not amount to imposing penalty. It has further been held that, however, if the forfeiture is of the nature of penalty, then Section 74 would be applicable. This Court has further held that under the terms of the contract, if the party in breach undertook to pay a sum of money or to forfeit a sum of money which he had already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

39. Relying on the aforesaid observations of this Court, the NCDRC, in a series of cases right from the year 2015, has held that 10% of the BSP is a reasonable amount which is liable to be forfeited as earnest money. The NCDRC has initially taken this view in the case of ***DLF Ltd. v. Bhagwanti Narula*** (supra). The said view has been followed subsequently in various judgments of the NCDRC. We see no reason to upset the view consistently taken by the NCDRC based on the judgment of this Court in the case of ***Maula Bux*** (supra):
40. Though we are not inclined to interfere with the direction of the NCDRC for refund of the amount in excess of 10% of the BSP, we however find that the NCDRC was not justified in awarding interest on the amount to be refunded.
41. As has been pointed out herein above, after the Agreement was entered into between the Parties in the year 2014, only after the possession was offered by the Appellant to the Respondents, they sought cancellation of the allotment. The reason given by the appellant that on account of sharp decline in the prices, a person would be able to buy a flat at a substantially lower price even in Primary market.
42. It is quite probable that the Respondents would have utilised the money which was payable by them to the Appellant for purchasing another property at a lower rate.
43. In the facts and circumstances, therefore, we find that the NCDRC was not justified in awarding interest on the amount to be refunded by the Appellant.
44. In pursuance of our order dated 24th April 2023, the Appellant has refunded an amount of Rs.22,01,215/- to the Respondents. After deducting an amount of Rs.17,08,140/- (i.e. 10% of the BSP) from Rs.51,12,310/- (amount paid by the Respondents to the Appellant), the amount comes to Rs.34,04,170/-. The Appellant is, therefore, required to pay balance amount of Rs.12,02,955/- [Rs.34,04,170/- minus Rs.22,01,215/-] to the Respondents. We, therefore, direct the Appellant to pay the said amount of Rs.12,02,955/- to the respondents within a period of six weeks from today.
45. The appeal is partly allowed in the above terms.
46. Pending application(s), if any, shall stand disposed of.

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(B.R. GAVAI)
!
(S.V. BHATTI)

**NEW DELHI;
 FEBRUARY 03, 2025**

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Editor : Sri B Pradhan

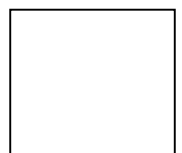
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