

Advantage Consumer

Monthly News Letter of Consumer Protection Council, Rourkela

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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.)

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)

JUDGEMENT

B.R.GAVAI,J.

1. The present appeal takes exception to the final judgment and order dated 25th October, 2022 passed in Consumer Complaint No. 262 of 2018, where by the National Consumer Disputes Redressal Commission (here in after, "NCDRC") *disposed of* the Consumer Complaint filed by the Respondents1and2(here in after referred to as, "Complainants" or "Respondents")there by directing the Appellant to deduct only 10% of the Basic Sale Price ("BSP" for short) towards cancellation of the Complainants' Apartment and refund the balance amount along with simple interest @ 6% per annum from the date of each payment till the date of refund. Aggrieved thereby, the present appeal has been filed under Section 23 of Consumer Protection Act, 1986.
2. The facts, *in brief*, giving rise to the present appeal are as given below.
 - 2.1 On 10th January, 2014 the Complainants had booked an Apartment with the Appellant in the project by the name "Godrej Summit" situated at Sector 104, Gurgaon, Haryana by an Application Form and submitted Rs. 10,00,000/- as application money.

- 2.2** On 20th June, 2014 by an allotment letter, the Appellant allotted an Apartment being Apartment No. C-1501 on the 14th floor in Tower 'C' to the Complainants in the above-mentioned project, pursuant to which an Apartment Buyer Agreement (hereafter referred to as "the Agreement") was entered into between the Parties.
- 2.3** On 20th June, 2017 the Appellant upon completion of construction applied to and subsequently received the Occupation Certificate from the Director, Town & Country Planning Department, Haryana.
- 2.4** On 28th June, 2017 the Appellant offered possession to the Complainants. The Complainants, however, sought cancellation of the allotment and further sought full refund of the amount paid.
- 2.5** On 29th September, 2017, the Complainants served a legal notice to the Appellant for refund of the amount paid totaling Rs. 51,12,310/-.
- 2.6** Thereafter, on 14th November, 2017, the Complainants filed a Consumer Complaint (No. 262 of 2018) before the NCDRC *inter-alia* praying that Appellant be directed to refund the sum totaling Rs. 51,12,310/- paid by the Complainants so far, with interest @18% per annum, calculated from the date of making each payment till the date of realization of the sum.
- 2.7** Vide impugned order dated 25th October, 2022, the NCDRC *disposed of* the Consumer Complaint by directing the Appellant to deduct only 10% of the BSP i.e. Rs. 17,08,140/- only towards cancellation of the Complainants' Apartment and refund the balance amount Rs. 34,04,170/-, i.e. (Rs. 51,12,310 – Rs. 17,08,140) along with simple interest @6% per annum from the date of each payment till the date of refund within 3 months.
- 2.8** On 5th December, 2022, the NCDRC also dismissed the Review Application filed by the Appellant challenging the impugned order.
- 2.9** Aggrieved thereby, on 10th January 2023 the Appellant filed the present Appeal challenging only the order dated 25th October 2022.
- 2.10** By an order dated 24th April, 2023, this Court while issuing notice had granted stay of the impugned order on the condition that the Appellant refunds the amount deposited by the Complainants after deducting 20% (earnest money deposit) along with interest @ 6% per annum from the date of cancellation of the contract.
- 3** We have heard Shri Dhruv Mehta, learned Sr. Counsel appearing on behalf of the Appellant and Shri Ashwarya Sinha, learned Counsel appearing on behalf of the Respondents.
- 4** Shri Dhruv Mehta submits that the NCDRC has grossly erred in interfering with the contractual terms as entered into between the Parties. It is submitted that the Agreement between the parties specifically provided for a forfeiture clause. The Agreement provided that the Appellant was entitled to forfeit the entire earnest money and any other due payable by the buyer including interest on delayed payment.
- 5** He further submits that the NCDRC has specifically come to a conclusion that the Appellant was entitled to cancel the Apartment and forfeit the amount as per the terms and conditions of the Application Form and/or the Agreement between the parties. He submits that having arrived at such a finding, the NCDRC could not have come to a conclusion that the condition of forfeiture of 20% of BSP, being the earnest money liable for forfeiture in case of cancellation, was unreasonable and interfered with the same by reducing it to 10% of the BSP.
- 6** He further submits that, from the perusal of the email addressed by the Respondents to the Appellant, it was clear that though the Appellant had called upon the Respondents to take possession of the Apartment, they had opted out of the deal only because there was a recession in the market. He submits that since the Respondents themselves have cancelled the deal on account of recession in the market, the Appellant was fully justified in forfeiting the earnest money deposit.
- 7** He relies on the judgments of this Court in the cases of **Satish Batra v. Sudhir Rawal** and **Desh Raj and others v. Rohtash Singh** in support of his submissions.

8 Per contra, Shri Ashwarya Sinha, learned counsel for the Respondents, relying on the judgments of the NCDRC in the cases of **Komal Aggarwal v. Godrej Projects Development Ltd., DLF Ltd. v. Bhagwanti Narula** and **Ramesh Malhotra and Another v. Emaar Mgf Land Limited and Another**, submits that the NCDRC has consistently held that the condition of forfeiture of 20% of the BSP was not reasonable and reduced it to 10% of the BSP.

9 He further relying on the judgments of this Court in the cases of **Ireo Grace Realtech Private Limited v. Abhishek Khanna and others** and **Pioneer Urban Land and Infrastructure Limited v. Govindan Raghavan** submits that the condition of forfeiture of 20% of the BSP was one-sided and unconscionable and, therefore, not enforceable in law.

10 He lastly relying on **"The Real Estate (Regulation and Development) Act, 2016"** and **"The Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018"**, submits that in view of the aforesaid Act and Regulations, the forfeiture of earnest money deposit cannot be more than 10% of the BSP.

11 In the present case, it is not in dispute that the Complainants had booked an Apartment with the Appellant for BSP of Rs.1,70,81,400/- on 10th January 2014. Accordingly, an Agreement was entered into between the Appellant and the Complainants on 20th June 2014. The Complainants were also allotted an Apartment on the 14th Floor in Tower 'C' on 20th June 2014. On 20th June 2017, the Appellant received the Occupation Certificate. On 28th June, 2017, the Appellant issued intimation to the Respondents calling upon them to take possession. However, instead of taking possession, by email dated 22nd August 2017/31st August 2017, the Respondents refused to take possession and sought cancellation.

12 The Appellant vide communication dated 1st September 2017 informed the Respondents that out of the amount deposited by the Respondents, the Respondents were entitled to refund of Rs.4,22,845/-. However, the Respondents filed a complaint seeking refund of an amount of Rs.51,12,310/- along with other ancillary reliefs. The NCDRC, as aforesaid, passed the impugned order.

13 It will be relevant to refer to clauses 2.6 and 8.4 of the Agreement entered into between the Parties, which read thus:

"2.6 It has been specifically agreed between the Parties that, 20% of the Basic Sale Price, shall be considered and treated as earnest money under this Agreement ("Earnest Money"), to ensure the performance, compliance and fulfillment of the obligations and responsibilities of the Buyer under this Agreement. It has been made clear by the Developer and the Buyer has understood that the Sale Consideration and Statutory Charges as mentioned in Schedule VI hereto have been computed on the basis of Super Built Up Area of the Apartment. The Buyer agrees that the calculation of Super Built Up Area in respect of the Apartment is tentative at this stage and subject to variations till the Completion of Construction. In case such variations are beyond +/- 5%, then the Developer shall take prior consent of the Buyer.

8.4 On and from the date of such termination on account of Buyer's Event of Default as mentioned above ("Termination Date"), the Parties mutually agree that-

- (i) The Developer shall, out of the entire amounts paid by the Buyer to the Developer till the Termination Date, forfeit the entire Earnest Money and any other dues payable by the Buyer including interest on delayed payments as specified in this Agreement.
- (ii) After the said forfeiture, the Developer shall refund the balance amount to the Buyer or to his banker/financial institution, as the case may be, without any interest;

(iii) On and from the Termination Date, the Buyer shall be left with no right, title, interest, claim, lien, authority what so ever it her in respect of the Apartment or under this Agreement and the Developer shall be released and discharged of all its liabilities and obligations under this Agreement.

(iv) On and from the Termination Date, the Developer shall be entitled, without any claim or interference of the Buyer, to convey, sell, transfer and/or assign the Apartment in favor of third party (ies) or otherwise deal with it as the Developer may deem fit and appropriate, in such a manner that this Agreement was never executed and without any claim of the Buyer to any sale proceeds of such conveyance, sale, transfer and/or assignment of the Apartment in favour of third party(ies)."

14. It can thus be seen that as per the Agreement between the Parties, the Complainants were required to pay earnest money deposit of 20%of the BSP, which undisputedly has been paid. As per clause 8.4, on termination on account of Buyer's Event of Default, the Developer was entitled to forfeit the entire earnest money deposit and other dues including interest on delayed payments as specified in the Agreement.

15. Undisputedly, only upon the Appellant calling upon the Respondents to take possession, the Respondents informed the Appellant vide email dated 22nd August 2017 asunder:

"Some of the promised connections from internal roads to externals have been abandoned. Overall, the place fails to invite you, entice your and the most painful part is the fact that the market prices have sharply fallen and a similar flat to a new buyer is available at a substantially lower price, not only in secondary market but even by Godrej themselves. This is unfair, and one feels cheated that an old customer of 4 years is a loser compared to the new one. Under the circumstances, am pained to state that I want to cancel my booking of the said flat and demand that the amount paid till date be refunded along with applicable interest. We shall appreciate a prompt action on our request. Kindly share the cancellation formalities, and the refund amount."

16. The stand taken by the Respondents was specifically borne out by the NCDRC from the written statement filed by the Appellant.

17. It is thus clear that the Respondents had cancelled the deal since there was recession in the market. Not only that, but the NCDRC has specifically observed as under:

Hence, the action of the Ops in cancelling the apartment and forfeiting the amount as per terms and conditions of the application form and/or the BBA cannot be faulted with. However, the conditionofforfeitureof20% of BSP, being the earnest money liable for forfeiture in case of cancellation appears unreasonable. It will be in the interest of justice and fair play to both sides, if Ops are allowed to deduct only 10% of the BSP as earnest money i.e. Rs.17,08,140/- and refund the balance amount to the complainants."

18. This Court in the case of **Satish Batra v. Sudhir Rawal** (supra), after considering the earlier judgments of this Court, has observed thus:

"15. The law is, therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the as earnest money then the forfeiture clause will not apply.

When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, "earnest" is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause that militates against the clauses extracted in the agreement dated 29-11-2011.

We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs 7,00,000 as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit. The High Court has, therefore, committed an error in reversing the judgment of the trial court."

19. This Court has held that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. It has been observed that the earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. However, this Court clarified that if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply.
20. Recently, this Court in the case of ***Desh Raj and others*** (supra), after considering the earlier judgments, has reiterated the aforesaid legal position.
21. We, therefore, find that Shri Dhruv Mehta, learned Senior Counsel is justified in placing reliance on the aforesaid judgments of this Court.
22. However, the issue does not rest at that. It will be relevant to consider the reciprocal obligations of the Appellant i.e., the Developer in case the Developer does not comply with the timelines in the Agreement. Clauses 4.2 and 4.3 of the Agreement are as follows:

"4.2. The Apartment shall be ready for occupation within 42 months from the date of issuance of Allotment Letter. ("Tentative Completion Date"), however the Developer is entitled for a grace period of 6 months over and above this 42 month's period. Upon the Apartment being ready for possession and occupation the Developer shall issue the Possession Notice to the Buyer of the Apartment. Not with standing the above, the Developer shall be entitled to an extension of time from the Tentative Completion Date for issue of the Possession Notice, if the Completion of Construction of the said Apartment or the part/portion of the Project where the said Apartment is situated is delayed on account of any of the following reasons -

- (i) Non-availability of steel, cement, other building materials, water or electric supply or labour, or
- (ii) Any change in the Applicable Law or existence of any injunction, stay order, prohibitory order or directions passed by any Court, Tribunal, Body or Competent Authority; or

- (iii) Delay in securing any permission, Approvals, NOC, sanction building plan, building completion and/or occupation certificate, water, electricity, drainage or sewerage connection from the Competent Authority for reasons beyond the control of the Developer, or
- (iv) Force Majeure Event or any other reason (not limited to the reasons mentioned above) beyond the control of or unforeseen by the Developer, which may prevent, restrict, interrupt or interfere with or delay the construction of Project on the Subject Lands or which may prevent the Developer In performing its obligations under this Agreement;

In case there are is any delay on account of the aforesaid reasons, the Developer shall keep the Buyer fully informed about the same along with a revised tentative date of possession.

4.3. Subject to the provisions of Clause 4.2 herein above, in the event 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, then the Developer shall be liable to pay to the Buyer a compensation for the entire period of such delay computed at the rate of Rs. 5/-(Rupees Five only) per month per square feet of the Super Built Up Area of the Apartment.

In the alternative, the Developer, at the request of the Buyer, may refund the total amounts already received in respect of the said Apartment together with simple interest at the rate of 15% per annum to the Buyer. It has been agreed between the Parties that upon such repayment, the Agreement shall stand terminated and the Buyer shall not be entitled to claim any loss and / or damages whatsoever. The said refund by the

To be concluded in the next issue.....

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