BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.292/2019 & 35/2021
Date of Decision: 24.03.2023

Appeal No.292 of 2019

Experion Developers Private Limited,

Registered Address:

Office at F-9, First Floor, Manish Plaza 1, Plot No.7, MLU, Sector 10, Dwarka, New Delhi-110075

Corporate Address:

Second Floor, Plot no.18, Institutioal Area, Sector 32, Gurugram, Haryana -122001.

Appellant

Versus

1. Sanjay Jain son of lat Shri Gian Chand Jain

2. Smt. Kokila Jain wife of Mr. Sanjay Jain

   R/o 1302, New Jai Bharat Apartments, Plot No.5, Sector 4, Dwarka New Delhi-110075.

Respondents

Appeal No.35 of 2021

1. Sanjay Jain son of lat Shri Gian Chand Jain

2. Smt. Kokila Jain wife of Mr. Sanjay Jain

   R/o 1302, New Jai Bharat Apartments, Plot No.5, Sector 4, Dwarka New Delhi-110075.

Appellants

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Experion Developers Private Limited,

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Corporate Address:

Second Floor, Plot no.18, Institutioal Area, Sector 32, Gurugram, Haryana -122001.

Respondent

CORAM:

Justice Rajan Gupta	Chairman
Shri Inderjeet Mehta,	Member (Judicial)
Shri Anil Kumar Gupta,	Member (Technical)

Argued by:

Shri Sanjay Kaushal, Sr. Advocate assisted by Shri Kamal Jeet Dahiya, Advocate and Ms. Shelly Arora, Advocate, for promoter (appellant in appeal no.292/2019 & respondent in appeal no.35/2021)

Shri Kinshuk Nanda, Advocate for allottees (respondents in appeal no.292/2019 & appellants in appeal no.35/2021).

O R D E R:

INDERJEET MEHTA, MEMBER (JUDICIAL):

By virtue of the present order handed down in appeal No.292/2019, titled "Experion Developers Private Limited Vs. Sanjay Jain & Anr.", another appeal bearing no.35/2021 titled "Sanjay Jain & Anr. Vs. Experion Developers Private Limited", shall also be disposed of as both these appeals have been directed against the same impugned order dated 31.01.2019.

2. In order to avoid the confusion with respect to the identity of the parties, the appellant in appeal no.292/2019 and respondent in appeal no.35/2021, shall be referred as the

'Promoter'. Similarly, the respondents in appeal no.292/2019 and appellants in appeal No.35/2021 shall be referred as the 'Allottees'.

3. Feeling aggrieved by the order dated 31.01.2019, handed down by learned Haryana Real Estate Regulatory Authority, Gurugram, (hereinafter called 'the Authority'), in Complaint No.1597 of 2018, titled "Sanjay Jain & Anr. Vs. M/s Experion Developers Private Limited", vide which the complaint filed by the allottees for refund of the amount deposited by them with the promoter was partly allowed, the promoter has chosen to file the aforesaid appeal no.292 /2019.

4. As back as on 28.10.2013, the allottees had booked a plot in the project namely "The Westerlies" Sector-108, Gurugram, launched by the promoter, by paying an amount of Rs.11,00,000/- to the promoter. Thereafter, vide provisional allotment letter dated 07.11.2014, the allottees were allotted a plot bearing no.E3/05, block 'E' in Sector-108, Gurugram. A 'Plot Buyer Agreement' (for brevity 'the agreement') was executed between the parties on 11.11.2014. Subsequent to the allotment, towards the total sale consideration of the plot i.e. Rs.2,13,51,409/-, the allottees deposited an amount of Rs.84,99,272/- till the year 2016. As per the stipulation of the

agreement, the possession of the said plot was to be handed over to the respondents/allottees within four years plus six months grace period after receipt of all the statutory approvals from the government.

5. The respondents/allottees also alleged that the payment plan offered by the promoter was quite difficult as it intended to receive the entire payment within a span of 2½ years approximately. The respondents/allottees visited the site after 1½ year and found that there was no sign of any development nor any sewerage line had been earmarked. The respondents/allottees visited the office of the promoter to inquire as to when the development of the project would start. However, instead of giving any plausible explanation, the concerned official of the promoter asked them to make payment as per the schedule and they should not bother about the completion of the project. According to the status of the project, since the respondents/allottees had apprehensions regarding the development of the project, so, they withheld the further payment.

6. Again, in January, 2016, the respondents/allottees visited the site and they were shocked to see that no development of the project had started and only sand was lying on the roadside. Similar was the status of development of

the project in January 2017 when the respondents/allottees again visited the project. In the month of April, 2017, the respondents/allottees on their visit also observed that even the plot numbers as well as the area had not been demarcated. Though the respondents/allottees had paid an amount of Rs.84,99,272/- approximately 40% of the total value of the plot till April, 2017, but no progress in the project was made. On 27.04.2017, the promoter all of a sudden issued a cancellation notice vide which they forfeited the amount to the extent of 90% of the respondents/allottees which according to law amounted to unfair trade practice. The respondents/allottees were also shocked to know that though they had deposited an amount of Rs.84,99,272/-, but in the cancellation letter the said amount was mentioned as Rs.64,04,713/- only. After receipt of the said cancellation notice, the respondents/allottees approached the promoter for refund of the deposited amount, but all their efforts in this regard proved futile. So, having no other option, they instituted the complaint before the learned Authority for refund of the entire deposited amount.

7. Upon notice, the promoter resisted the complaint preferred by the respondents/allottees on the ground of jurisdiction, locus standi, cause of action, estoppels and

suppression of material facts. On merits, the promoter has taken the stand that as per Clause 11 of the agreement, timely payment of the amount by the respondents/allottees was the essence of the contract and it was specifically emphasized that interest @ 18% per annum shall be payable by the respondents/allottees on the delayed payments. Further, as per Clause 15 of the terms and conditions of the booking, it was specifically provided that subject to timely payment of all amounts payable by the respondents/allottees and subject to reasons beyond the control of the promoter, the possession of the plot was proposed to be offered within four years, excluding grace period of six months, from the date of receipt of the last of all the project approvals required for the commencement of development of the project.

8. Further, it was alleged that the respondents/allottees opted for a payment plan that was partly time bound and had agreed and undertaken to pay the instalments as and when demanded by the promoter. Since, the respondents/allottees did not make the payment of the due amount within the stipulated period, so, demand notices/reminders dated 27.12.2013, 27.01.2014 and 20.02.2014 were issued. Thereafter, a final notice dated 06.03.2014 and demand letter dated 25.04.2014 was also

sent. Out of the demanded amount of Rs.53,50,499/-, the respondents/allottees made payment of only Rs.7,00,000/-. Again, a demand notice dated 27.05.2014 was sent, however, the same was ignored by the respondents/allottees and ultimately vide cancellation letter dated 09.06.2014, the provisional allotment of the allotted plot was cancelled.

9. Thereafter, the respondents/allottees vide letter dated 23.06.2014 admitted that they had defaulted in making payment as per the payment plan on account of personal reasons and requested for restoration of the allotment in their favour and agreed to pay the entire due amount along with interest in a short span. However, despite that undertaking, the respondents/allottees failed to make the due payment. Thereafter, letter dated 01.06.2015, demand notice dated 30.11.2015, reminder dated 29.11.2015, second reminder dated 21.01.2016, final notice dated 04.02.2016, demand notice dated 03.03.2016, reminder dated 01.04.2016, final notice dated 09.05.2016, letter dated 16.06.2016 and demand letter dated 16.06.2016 were sent, but the respondents/allottees did not adhere to the same. The respondents/allottees were given the final opportunity to regularize their allotment by making payment of outstanding amount of Rs.90,09,558/- along with delayed interest @ 18%,

within 30 days. Since, there was no response from the respondents/allottees, so, the allotment of the respondents/allottees was cancelled vide final cancellation letter dated 27.04.2017.

10. While denying all other allegations in the complaint, the promoter prayed for dismissal of the complaint.

11. After taking into consideration the material facts and documents adduced by both the parties, the learned Authority while exercising the powers vested in it under Section 37 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act'), disposed of the complaint preferred by the respondents/allottees with the following directions:-

> *"(i) The respondent is directed to deduct only 10% amount out of the total sale price as earnest money and refund the balance amount within a period of 90 days from the date of this order."*

12. Since the respondents/allottees were not refunded the entire deposited amount and they were not awarded interest at the prescribed rate on the amount, after deduction of 10% of the total sale consideration amount, so they, too, felt aggrieved and preferred Appeal No.35/2021 titled "Sanjay Jain & Anr. Vs. Experion Developers Private Limited".

13. Initiating the arguments, the learned counsel for the promoter, while drawing our attention towards Clause 11 of the of the agreement, has contended that timely payment of the amount by the allottees was the essence of the contract and it was specifically stipulated that interest @ 18% per annum shall be payable by the allottees on the delayed payments. Further, it has been submitted that as per Clause 15 of the terms and conditions of the booking, it was specifically provided that subject to timely payment of all amounts payable by the allottees and subject to reasons beyond the control of the promoter, the possession of the plot was proposed to be offered within four years, excluding grace period of six months, from the date of receipt of the last of all the project approvals required for the commencement of development of the project. Further, it has been submitted that the allottees have been extremely irregular and have deliberately failed to pay the instalments consistently in spite of several notices and reminders issued to them. Lastly, it has been submitted that the promoter has developed the project on the promise of timely payment from the customers and giving refund by deducting just 10% of the total sale consideration, as ordered in the impugned order, would render the project of the promoter financially unviable and unsustainable. Reliance has been placed upon

the citation ***Satish Batra v. Sudhir Rawal 2013 (1) SCC 345.***

14. Per contra, learned counsel for the allottees has submitted that the earnest money is part of the purchase price when the transaction goes forward and as the allottees had deposited Rs.11,00,000/- initially for the allotment of the unit, so, the said amount of Rs.11,00,000/- in the given facts and circumstances of the present case is the earnest money. Further, it has been submitted that the learned Authority failed to appreciate this fact of the case and not only directed to forfeit 10% of the sale consideration, but also did not grant interest at the prescribed rate on the deposited amount after deduction of the amount of Rs.11,00,000/-, which is the earnest money in the present case. Reliance has been placed upon citation ***DLF Limited v. Bhagwati Narula 2015 (16) RCR (Civil) 72, HUDA*** and ***Pioneer Urban Land and Infrastructure Ltd. v. Govindan Raghavan 2019 (5) SCC 725***.

15. For the proper adjudication of the aforesaid submissions made by learned counsel for the parties, first of all, let the admitted facts be taken note of. Admittedly, the allottees had booked a plot in the project namely "The Westerlies" Sector-108, Gurugram, launched by the

promoter, by paying an amount of Rs.11,00,000/- to the promoter and thereafter, vide provisional allotment letter dated 07.11.2014, the allottees were allotted a plot bearing no.E3/05, block 'E' in Sector-108, Gurugram. The agreement was executed between the parties on 11.11.2014. It is also admitted fact that the allotted plot was cancelled by the promoter vide letter dated 27.04.2017.

16. Though, the respondents/allottees in the complaint filed before the Authority have claimed refund to the tune of Rs.84,99, 272/-, which they allegedly deposited with the appellant/promoter, but as per the case set up by the appellant/promoter, the respondents/allottees have deposited an amount of Rs.64,04,713/- only. The learned Authority in para no.34 of the impugned order has clarified this aspect and has observed that the respondents/allottees are trying to take advantage of receipt dated 06.07.2016, which was issued mistakenly by the appellant/promoter in favour of the respondents/allottees. In fact, the said receipt was issued against the payment of Rs.19,53,666/- paid through Demand Draft dated 30.06.2016 drawn on ICICI Bank, which was submitted by another allottee, Mr. Puneet Alagh, of plot E3/07 of the same project. It was also observed that the said amount was disbursed from ICICI

Bank loan account in the name of Mr. Puneet Alagh, who had obtained the home loan from the said bank. A specific observation was made by the learned Authority that the plot allotted to the respondents/allottees was not financed by any financial institution, thus, there can be no question of disbursement of said amount in favour of the respondents/allottees by ICICI Bank. Accordingly, it is explicit that the respondents/allottees had only deposited an amount of Rs.64,04,713/- regarding the plot allotted to them.

17. The legal position with regard to the earnest money has been dealt in detail by Hon'ble Supreme Court in citations ***Maula Bux v. Union of India (1969)(2) SCC 554,*** *and* ***Satish Batra's*** case (supra) and the same can be condensed as follows:-

> *"Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault of failure of the vendee. 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 the double the amount, if it is so stipulated. In other words, earnest money 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."*

18. The perusal of Article I Clause 1(xiii) of the agreement dated 11.11.2014 shows that it has been specifically stipulated that earnest money would be 15% of the basic sale price which was meant to ensure performance, compliance and fulfillment of obligations and responsibilities of the buyer. Though, the allottees have taken the stand that the earnest money in the present case is Rs.11,00,000/- which was deposited by them at the time of booking of the plot, but the same cannot be attached any credence because the booking is only request for allotment and does not constitute a final allotment or agreement.

19. Now, the question to be determined is that whether the earnest money to the tune of 15% of the basic sale price, as stipulated in the Agreement of 11.11.2014 can be termed as reasonable or not? In citation ***Pioneer Urban Land and***

Infrastructure Ltd.'s case (supra), the Hon'ble Supreme Court has laid down that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between the parties, who are not equal in bargaining power. A term of a contract will not be final and binding if it is shows that flat purchaser had no option but to sign on the dotted line, on a contract framed by a builder. Further, incorporation of one-sided clauses in an agreement constitutes an unfair trade practice since it adopts unfair methods or practices for the purpose of selling the flat by the builder.

20. In citation ***DLF Ltd.'s*** case (supra), the Hon'ble National Consumer Disputes Redressal Commission, while discussing the cases of ***Maula Bux's*** case (supra), ***Satish Batra's*** case (supra) and other cases as mentioned in para No.10 of the said order, has clearly laid down that only a reasonable amount can be forfeited as earnest money in the event of default on the part of the purchaser and it is not permissible in law to forfeit any amount beyond a reasonable amount unless it is shown that the person forfeiting the said amount had actually suffered loss to the extent of the amount forfeited by him. Further, it was held that 20% of the sale

price cannot be said to be a reasonable amount which the petitioner company could have forfeited on account of default on the part of the complainant unless it can show it had suffered loss to the extent the amount was forfeited by it. In absence of evidence of actual loss, forfeiture of any amount exceeding 10% of the sale price, cannot be said to be a reasonable amount.

21. In his last desperate attempt, learned counsel for the promoter has submitted that since the allottees had specifically agreed to pay 15% of the sale price as earnest money, the forfeiture to the extent of 15% of the sale price cannot be said to be unreasonable as the same is in consonance with the terms agreed between the parties. He has also submitted that so long as the promoter was acting as per the terms and conditions agreed between the parties, it cannot be said to be deficient in rendering services to the allottees. This aforesaid submission as put forward by the learned counsel for the promoter, was also submitted before the Hon'ble National Consumer Disputes Redressal Commission, New Delhi in *DLF's* case (supra) and while dealing with the same, it was observed that forfeiture of the amount which cannot be shown to be a reasonable amount, would be contrary to the very concept of forfeiture of the

earnest money and if the said contention is accepted, then, an unreasonable person in a given case may insert a clause in Buyer's Agreement whereby say 50% or even 75% of the sale price is to be treated as earnest money and in the event of the default on the part of the buyer, he may seek to forfeit 50% sale price as earnest money. It was further observed and held that an agreement for forfeiting more than 10% of the sale price would be invalid since it would be contrary to the established legal principle that only a reasonable amount can be forfeited in the event of default on the part of the buyer. Here, it is also pertinent to mention that the deduction of 10% of the total sale consideration of the unit, out of the amount deposited by the allottees, is also inconformity with the Regulations 2018, as notified by the Authority, wherein, it has been stipulated that forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the Real Estate i.e. apartment/plot/building.

22. Thus, as a consequence to the aforesaid discussion, we are of the considered view that there is no irregularity or illegality in the findings of the learned Authority to direct the promoter to forfeit only 10% of the sale consideration amount (i.e. 10% of Rs.2,13,51,409 =

Rs.21,35,140/-) and to refund the balance of amount (i.e. 64,04,713 - Rs.21,35,140) Rs.42,69,573/- . Since, no interest has been granted to the allottees on the refund amount, so, they are entitled for the refund of the said amount i.e. Rs.42,69,573/- (Rupees forty two lacs, sixty nine thousand, five hundred and seventy three only) along with interest at the prescribed rate prevailing as on today, i.e. @ 10.6% per annum (SBI highest MCLR + 2%), as per Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, from the date of institution of the complaint before the learned Authority, till its realisation.

23. Resultantly, as a consequence to the aforesaid discussions, we are of the opinion that Appeal No.292 of 2019 titled "Experion Developers Private Limited Vs. Sanjay Jain & Anr.", preferred by the promoter containing no merits deserves dismissal and is accordingly dismissed.

24. However, Appeal No.35 of 2021 titled "Sanjay Jain & Anr. Vs. Experion Developers Private Limited", preferred by the allottees is partly allowed as referred to above.

25. The amount of Rs.42,69,573/- deposited by the promoter with this Tribunal to comply with the provisions of proviso to Section 43(5) of the Act, be remitted to the learned

authority for disbursement to the allottees subject to tax liability, if any, as per law and rules.

26. A certified copy of this order be placed on the record of Appeal No.35 of 2021 titled as "Sanjay Jain & Anr. Vs. Experion Developers Private Limited".

27. Copy of this order be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

28. Both the files be consigned to the record.

Announced:
March 24, 2023

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

CL