

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

Appeal Nos.25 of 2019 & 463 of 2022

Date of Decision: 08.01.2024

Appeal No.25 of 2019

1. Dr. Raminder Singh s/o Shri Sardar Singh
2. Mrs. Inderjeet Kaur w/o Dr. Raminder Singh
3. Mr. Tarunjyot Singh s/o Dr. Raminder Singh

All Residents of House No.3124, Sector 20-D,
Chandigarh.

Appellants

Versus

1. Experion Developers Private Limited Corporate Office: 1st
Floor, B Block, Sushant Lok-1, MG Road, Gurugram-
122002.
2. Housing Development Finance Corporation Limited,
Capital-9, Munirka, New Delhi.

Respondents

3. Ms. Parneet Anand d/o Shri Gurcharan Singh, R/o AD-
30, First Floor, Tughlak Garden, New Delhi.

Proforma Respondent

Appeal No.463 of 2022

Experion Developers Private Limited, F-9, First Floor,
Manish Plaza-1, Plot No.7, MLU, Sector-10, Dwarka, New
Delhi.

Appellant

vs.

1. Dr. Raminder Singh s/o Shri Sardar Singh
2. Mrs. Inderjeet Kaur w/o Dr. Raminder Singh
3. Mr. Tarunjyot Singh s/o Dr. Raminder Singh
4. Ms. Praneet Anand d/o Sh. Gurcharan Singh

Appeal Nos. 25 of 2019 & 463 of 2022

All Residents of House No.3124, Sector 20-D,
Chandigarh.

Respondents

5. Housing Development Finance Corporation Limited,
Capital Court, 9 of Palme Marg, New Delhi.

Proforma Respondent

CORAM:

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

Present:

Dr. Raminder Singh, one of the appellant/allottees
(appellants in appeal no.25/2019 & respondents
no.1 to 4 in appeal no.463/2022)

Ms. Mehak Sawhney, Advocate for Experion
Developers Private Limited-Promoter (appellant in
appeal no.463/2022 & respondent no.1 in appeal
no.25/2019).

Mr. Yashvir Singh Balhara, Advocate for Housing
Development Finance Corporation Limited
(respondent no.2 in appeal no.25/2019 and
respondent no.5 in appeal no.463/2022)

ORDER:

Anil Kumar Gupta, Member (Technical)

This order of ours shall dispose of both the appeals
mentioned above which have arisen out of the same order
dated 25.10.2018 passed by the Haryana Real Estate
Regulatory Authority, Gurugram (hereinafter called the
'Authority') whereby complaint No.278 of 2018, filed by Dr.
Raminder Singh and others-complainants, (appellants and
Proforma respondent 3 in appeal no.25/2019 and respondents

no.1 to 4 in appeal no.463/2022), was disposed of with the following directions:-

“ (i) *“The respondents are directed to forfeit 10% of the total consideration amount deposited by the buyer on account of earnest money of non-payment of due instalments by the complainants. The complainants are seeking refund after forfeiture of the earnest money and the authority is of the considered view that the builder/promoter may refund the remaining amount by deducting only 10% of the total consideration amount. No interest shall accrue on this count.”*

2. As both the parties have filed appeal against the same order, so in order to avoid confusion with respect to the identity of the parties Dr. Raminder Singh and others-complainants, (appellants and proforma respondent 3 in appeal no.25/2019 and respondents no.1 to 4 in appeal no.463/2022) shall be referred to as ‘allottees’ and Experion Developers Private Limited (respondent no.1 in appeal no.25/2019 and appellant in appeal no.463/2022) shall be referred to as ‘promoter’ and Housing Development Finance Corporation Limited (respondent no.2 in appeal no.25/2019 and respondent no.5 in appeal no.463/2022) shall be referred to as ‘the Bank’.

3. As per the averment in the complaint, the promoter offered allotment of freehold residential plots in its project “The

Westerlies” being developed on contiguous land measuring 100.5 acres at Sector-108, Gurugram, Haryana. The allottees paid an initial booking amount of Rs.6,00,000/- vide cheque bearing no.003064 dated 16.04.2014 and cheque of Rs.5,00,000/- bearing no.237354 dated 16.04.2014, total amounting to Rs.11,00,000/-. The allottees were allotted plot no.C-3/34 at “The Westerlies” at Sector-108, Gurugram. The total sale consideration of the plot was Rs.2,98,07,359/-. The provisional allotment letter dated 23.04.2014 was issued by the promoter for a total sale consideration of Rs.2,98,07,359/- mentioning therein the payment plan. A plot buyer agreement (for brevity ‘agreement’) was executed between the allottees and the promoter on 08.08.2014. The allottees applied for a loan of Rs.2 crores from HDFC Limited (hereinafter called the ‘Bank’) and in furtherance of the same, a tripartite agreement dated 14.08.2014 was executed between the allottees, promoter and the bank. The allottees allege that the promoter did not carry out any development work at site even after lapse of a period of 46 months, however, kept on demanding payments from the allottees. The letter of demands raised from the allottees were directly sent to the bank as the payment was to be made by the bank as per the tripartite agreement.

4. It was further pleaded that upon receiving the demand letters dated 30.11.2015 and 29.12.2015, the

allottees came to know that the bank had not made the payment to the promoter. On 05.01.2016, the allottees contacted the bank about the reasons of non-payment to the promoter. Smt. Madhur Chandna, officer of the bank raised query from other officers of the bank namely Ms. Shweta Khanna through email dated 05.01.2016 as to “what is the demand against”. Ms. Shweta Khanna, sought clarification from another officer Mr. Madhur Chandna who clarified that as the development work had not been started in the project, hence, the current demand cannot not be released. Further, it was advised that the customer should get in touch with the builder for clarification on demand raised as the demand could be raised within 18 months of booking or development milestone, whichever is later, therefore, the payment could not be released. Thus, from the said email received from the bank, it was clear that no construction or development work at site had been carried out, therefore, the demand raised by the promoter was illegal and it was a deficiency in service.

5. The allottees further pleaded that they were stuck between the false demands of the promoter and the inspection report of the bank. The allottees conveyed the promoter that they had already made the payment of Rs.1,11,00,000/- (approximately) towards the sale price of the said plot, whereas, the promoter started imposing interest on the unpaid

instalments without even offering possession of the plot which is illegal. Allottee-Dr. Raminder Singh, visited the project site in the month of February, 2016 and found that the project was lying in ignored condition and there was no development at the site.

6. It was further pleaded that the plot site had not been developed even after a period of four years had elapsed and for that reason the bank was not releasing loan to the allottees for payment of the remaining installments to the promoter. In such circumstances, the allottees tried to get some financial help from some relation, friend etc. to pay the balance payment of the plot to the promoter. The promoter had not developed the plot and had not even given possession to the allottees so as to enable them to get the site plan approved and then to develop the plot.

7. It was further pleaded that the terms of the agreement are unilateral and monopolistic. The allottees had no option but to sign the same. The agreement was never a mutual agreement as every allottee has been forced to sign the same agreement. The promoter has cleverly inserted Article 9 of the allotment letter which mentions that the development work of the plot would be completed within 4 years. The development would be done out of the instalments received and such development would correspond to the payment of

installments but nothing as promised was done despite the payment of Rs.1,11,00,000/- (approximately).

8. Allottee – Tarunjyot Singh (complainant no.3) visited the office of the promoter and requested for refund of money as in view of the position at the spot, there could be no development at the site even in next two years. However, the officer of the promoter threatened to cancel the plot and forfeit the money deposited by the allottees. To the knowledge of the allottees, there are several criminal and civil cases pending against the promoter relating to fraud and breach of trust. Several allottees of this project are running from pillar to post for possession of plots. It was further pleaded that the allottees had filed Consumer Complaint No.445/2016 before the Hon'ble National Consumer Disputes Redressal Commission, New Delhi (for brevity 'NCDRC') for refund of the entire amount of Rs.1,10,24,430/- deposited by them. The promoter appeared in the said complaint and filed reply. The bank filed reply and affidavit dated 26.09.2016, maintaining their stand that there was no development at the site and thus no instalments can be released.

9. It was further pleaded that although in the agreement it is mentioned that the respondent no.1 has already taken necessary permission from the competent authority, but, the said contention is evidently incorrect,

because in case permission was there, then there would have been no obstruction in the development of the site. Further, in the written statement filed by the promoter before the Hon'ble National Commission, it is admitted that they had floated the scheme without approval from the competent authority and there is stay from the Hon'ble High Court in CWP no.19050 of 2012 titled as '**Chandra Shekhar Mishra vs. Union of India &Ors.**' for possession of the land. In the said writ petition, the Hon'ble High Court stayed the development works in the NCR Region in the year 2012 and the stay continued till October, 2015. It was only thereafter the promoter got the approval of zoning plan of the residential colony on 05.11.2015.

10. It was further pleaded that the promoter deliberately concealed the fact that the Ld. Civil Court, Gurugram has passed order dated 08.01.2013 and ordered that if any sale or any other deed creating third party interest was affected during the pendency of the suit in favour of the third party, then, the factum of the pendency of the said civil suit would be mentioned in the said deed. However, the promoter concealed this fact from the allottees as they did not mention the said fact in the agreement. Thus, without having any approved zoning plans, the promoter floated the scheme

and cheated the allottees as well as the general public by collecting hard earned money from them.

11. It was further pleaded that during the pendency of the consumer complaint, the allottee-Dr. Raminder Singh, filed an application under Right to Information Act, (for short 'RTI Act') before the Town and Country Planning Department Haryana and came to know that though the promoter had taken External Development Charges (EDC) from the allottees, however, the said amount had not been deposited by them to the department. An amount of Rs.22,63,49,000/- is outstanding against the promoter till 16.09.2016. Thus, the promoter itself mis-utilized the amount deposited by the allottees and siphoned off the money.

12. It was further pleaded that during the pendency of the consumer complaint, the promoter vide letter dated 29.04.2017, cancelled the allotment of plot no.C-3/34 and forfeited an amount of Rs.66,76,002/-. The promoter also retained an amount of Rs.43,48,428/- on the pretext that the same would be refunded only after resale of the plot. Due to the cancellation of the above said plot during the pendency of the matter, fresh cause of action arose and the said complaint became infructuous. In such circumstances, the allottees withdrew the complaint and the same was disposed of vide order dated 04.12.2017. The cause of action arose on

29.04.2017 when the promoter cancelled the allotment of the plot in question and forfeited the amount of Rs.66,76,002/- and also retained the amount of Rs.43,48,428/-.

13. With the aforesaid pleadings, the allottees filed complaint before the authority seeking following relief:-

- a) Direct the promoter to refund amount of Rs.1,10,24,430/- along with interest @ 18% p.a. from the date of deposit till date of payment.
- b) Direct the promoter to refund the interest paid to Housing Development Finance Corporation Limited (HDFC) i.e. the bank, since August, 2014 till closure of accounts along with interest @ 18% p.a.
- c) Direct the respondent to refund of all legal costs of Rs.1.25 lac incurred by allottees (complainants).

14. The complaint was resisted by the promoter on the grounds of jurisdiction and some other technical grounds. It was pleaded that the project of the promoter was not an ongoing project as per rule 2(1)(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereafter referred to as 'the Rules, 2017'). Further, it was pleaded that the promoter had applied for part completion certificate of the said project on 27.07.2017, which is prior to the date of publication of the Rules, 2017 and as such the project is not an ongoing project. It was further pleaded that the allottees deliberately defaulted the payment of the installments which has resulted

in delay payment charges and on request of the allottees and as a special and one off case, believing assurances of the allottees in respect of timely payment of future instalments, the delay payment charges of Rs.68,370/- were waived off by the promoter. It was further pleaded that the promoter is continuing with the development of the project and has already obtained completion certificate for the said project and is in process for handing over possession of the plot. However, the allottees are merely speculative investors who defaulted in making payment of instalments. The allottees made the payment as per the payment plan only up to third installment, though not in time and never raised any issue whatsoever, which clearly reveals that the allottees had no issue or concern about the said plot as well as the terms and conditions of the agreement. With these pleadings, the promoter prayed for dismissal of the complaint being without any merits.

15. The authority after hearing the pleadings of the parties passed the impugned order the operative part of which has already been reproduced in the opening para of this order.

16. Aggrieved with the impugned order passed by the Authority, the allottees have filed appeal no.25 of 2019, whereas promoter has filed appeal no.463 of 2022.

17. We have heard the parties and have carefully gone through the record of the case.

18. Dr. Raminder Singh, one of the allottees, while reiterating the pleadings made in the complaint submitted that the allottees have already paid an amount of Rs.1,11,00,000/- (approximately) and even after a lapse of four years, the promoter had not started the development works of the project and the entire site is lying abandoned. Under these circumstances, the bank was not releasing the payment with respect to the demands made vide letters dated 30.11.2015 and 29.12.2015. The promoter vide payment request letter dated 30.11.2015 had demanded a sum of Rs.58,67,428/- to be made before 21.12.2015 and in a similar manner a further demand of Rs.58,90,575/- was raised vide letter dated 29.12.2015. The bank did not make the payment on the ground that the development work had not started in the project. However, the promoter sent another reminder dated 21.01.2016 for the demand already raised vide letter dated 29.12.2015 along with interest of Rs.68,370/-. He contended the project of the promoter is still not complete and therefore, the allottees are entitled for the refund of the amount paid by them along with interest from the date of each payment till realization as per law.

19. With these assertions, he contended that the impugned order may be modified and whole of the amount paid by the allottees may be refunded to them along with

interest from the respective dates of payments made by allottees to the promoter.

20. On the other hand, learned counsel for the promoter while reiterating the pleadings in the complaint contended that the bank vide its email dated 26.05.2016 had admitted its mistake and recommended disbursement of the installment stating that “with reference to the trail mail, please note that, initially the demand raised was refused for disbursement, since the development stage in our records was not in consistence with the milestone. Subsequently, we had conducted a site visit and upon verification of the development stage the disbursement for the said demand was recommended in our records.” The allottees in terms of the tripartite agreement failed to issue instruction to the bank to disburse the amount. It was further asserted that due to non-payment of the demand raised, the allotment in favour of the allottees was cancelled by the promoter vide its letter dated 29.04.2017. She asserted that the promoter had completed the project and applied for part completion certificate on 10.04.2017 and 27.07.2017 and pursuant to the said application, part completion certificates were granted by DGTCP on 31.07.2017 and 22.03.2018 respectively. The promoter had offered possession of the plots to the other allottees. She contended that as per the agreement, the

delivery of possession of the plot was to be made within four years from the date of the receipt of last project approval for commencement and development of the project from the competent authority plus six months grace period. The zoning plan was approved on 05.11.2015. Thus, the due date for offering the possession would come out to be 05.05.2020, though not conceded. Even if the said period is calculated from the date of execution of the buyer's agreement dated 08.10.2014, the date for offering delivery of possession would come to be 07.04.2019, whereas the part completion qua the plot in question was obtained much prior thereto. Counsel has referred to the affidavit dated 17.05.2023 of (promoter) Shri Suneet Puri son of Shri Chaman Lal Puri, Director of Experion Developers Private Limited filed on 19.05.2023 in pursuance to order dated 25.04.2023 passed by the Tribunal, wherein it is mentioned that there has been no delay on the part of the promoter in completing the project, whereas the fault lies with the allottees who failed to make the requisite payment in pursuance to the demand raised by the promoter, in accordance with the buyer's agreement. It is also mentioned in the said affidavit that the part completion certificates were applied on 10.04.2017 and 27.07.2017 and pursuant to the said applications, part completion certificates were granted by the competent authority on 31.07.2017 (46.257 Acres) and 22.03.2018 (44.178 Acres) respectively. Copies of the said

part completion certificates dated 31.07.2017 and 22.03.2018 were also annexed as Annexure P-16 (colly). It is further stated in the said affidavit that, that owing to some bonafide inadvertent clerical mistake, copy of part completion dated 31.07.2017 alone was annexed and copy of part completion dated 22.03.2018 was mistakenly missed out. Resultantly, the part completion in respect of the said plot in question came to be noted of the year 2017 whereas, that was covered under part completion applied on 27.07.2017 which was granted on 22.03.2018 (44.178 Acres). The copy of the said part completion is placed on record for just and appropriate adjudication of the matter. It was further stated in the said affidavit that the plot in question i.e. plot no.C-3/34 (residential) measuring 377 sq. mtrs/450.89 sq. yards in the project namely "Westerlies, Sector-108, Gurugram" is covered under part completion applied on 27.07.2017 and was issued on 22.03.2018.

21. She further asserted that the conjoint reading of clauses of Booking Application form and the agreement would reveal that the promoter on failure of the allottees to make payment as per prescribed schedule may cancel/ terminate the agreement and promoter will be at liberty to forfeit/ withhold/ deduct an amount equal to earnest money, service tax, commission, brokerage, taxes etc. Also, as per the

agreement, the forfeiture of 15% of the sale consideration plus brokerage paid by the promoter on booking plus interest on payments plus adjustment for EDC plus taxes are non-refundable. She contended that the service tax of Rs.8,49,868/- paid by the promoter is nonrefundable and promoter cannot be made liable to bear the same out of its own pocket.

22. She contended that pursuant to interim orders of the Hon'ble High Court dated 05.02.2019, the promoter has already refunded home loan of the allottees from HDFC Bank for amount of Rs.60 Lacs. She relied upon the letter dated 14.03.2019 issued by HDFC bank acknowledging receipt of Rs.60 Lacs.

23. With these pleas, learned counsel for the promoter contended for dismissal of the appeal filed by the allottees.

24. We have duly considered the aforesaid contentions of the parties.

25. Admittedly, the allottees booked a plot in the project of the promoter by paying booking amount of Rs.11,00,000/- through two cheques of even dated 16.04.2014. The provisional allotment letter regarding allotment of plot in the project of the promoter i.e. "The Westerlies" at contiguous land measuring 100.5 acres at Sector-108, Gurugram, for a sale

consideration of Rs.2,98,07,359/- was issued in favour of the allottees on 23.04.2014. The agreement between the allottees and the promoter with respect to plot no.C-3/34 in the project of the promoter was executed on 08.08.2014. As per 'Article IX(i)' of the agreement, the due date for delivery of possession is four years from the date of receipt of last project approval for commencement and development of the project from the competent authority plus six months grace period. The zoning plan was got approved by the promoter from the office of DTCP on 05.11.2015. Thus, the due date of delivery of possession comes out to 05.05.2020 and there is no dispute about this in the present appeals. The allottees have so far paid total amount of Rs.1,09,32,453/-(as per impugned order). A tripartite agreement between the allottees, promoter and the bank for advancing a loan of Rs.2 crores was executed in favour of the allottees to meet with the demands for purchase of the said plot.

26. The promoter raised payment request vide its letter dated 30.11.2015 for an amount of Rs.58,67,428/- and requested for payment to be made before 21.12.2015. Another, demand of Rs.58,90,575/- was raised vide letter dated 29.12.2015. The bank did not disburse loan installment for making these payments because as per the report of its technical official the development work had not reached at the

milestone as was required vide agreement. The promoter sent another reminder dated 21.01.2016 for payment of the already raised demand dated 29.12.2015 along with interest of Rs.68,370/-. Concededly, the allottees filed a consumer complaint no.445 of 2016 before the Hon'ble NCDRC, New Delhi for refund of the entire amount of deposited by them with the promoter. In the meantime, during the pendency of the said consumer complaint, the promoter cancelled the allotment of the plot in question vide its letter dated 29.04.2017 intimating forfeiture of Rs.66,76,002/-. However, the promoter did not pay back the balance amount to the allottees.

27. The plea of the allottees in their appeal is that since there is/was no development of the project, therefore, they are entitled for refund of the entire amount paid by them along with interest from the respective dates of each payment till realization. On the other hand, the plea of the promoter is that the allottees have failed to make the payment as per prescribed schedule and therefore in terms of the clauses of booking application form and buyer's agreement, the promoter can cancel the agreement and is at liberty to forfeit/withheld/deduct an amount equivalent to the earnest money, brokerage/commission and service tax etc. As per the plot agreement, the forfeiture is 15% of the sale consideration

plus brokerage paid by the promoter on booking plus interest on delayed payment plus adjustment for EDC plus taxes which are non-refundable and therefore the promoter has forfeited the amount of Rs.66,76,002/- on account of the said reasons.

28. The promoter has submitted an affidavit dated 17.05.2023 in compliance to the order dated 25.04.2023 of this Tribunal, of Shri Suneet Puri, Director of Experion Developers Private Limited (promoter) on 19.05.2023, wherein it is mentioned that part completion for the project was applied on 10.04.2019 and 27.07.2017 and pursuant to the said applications, part completion certificate was issued by the competent authority on 31.07.2017 (46.257 Acres) and 22.03.2018 (44.178 Acres) respectively. Resultantly, the part completion in respect of the said plot in question came to be noted of the year 2017 whereas, that was covered under part completion applied on 27.07.2017 which was granted on 22.03.2018 (44.178 Acres). The plot in question i.e. plot no.C-3/34 (residential) measuring 377 sq. mtrs/450.89 sq. yards in the project namely "Westerlies, Sector-108, Gurugram" is covered under part completion applied on 27.07.2017 and was issued on 22.03.2018. **Thus, it is observed that the promoter has been able to complete its project well within the due date of delivery of possession of the said plot.**

Therefore, keeping in view the evidence and material on record, it cannot be said that the demands raised by the promoter vide its letter dated 30.11.2015 for Rs.58,67,428/- and vide letter dated 29.12.2015 for Rs.58,90,575/- were not genuine which the allottees allege that they did not pay to the promoter because the bank had not released the aforesaid amount for loan on the ground that there was no development work at the site. **It is, thus, established that the allottees themselves were in default in not making the payments as demanded by the promoter, though it was partially on account of the bank's fault, therefore, under these circumstances, it is held that the cancellation letter dated 29.04.2017 issued by the promoter is valid.**

29. Let us now examine as to whether the promoter is entitled to forfeit an amount of Rs.66,76,002/- out of the total amount of Rs.1,09,32,453/- paid by the allottees and whether any interest is payable on the balance amount payable to the allottees?

30. As per the promoter, the promoter on cancellation of the plot is entitled to forfeit an amount of Rs.66,76,002/- on account of 15% of the sale consideration as earnest money plus brokerage paid by the promoter on booking plus interest on delayed payments adjustment of EDC plus taxes under the following terms of the agreement.

“Article 1: DEFINITION AND INTERPRETATIONS

(xiii) ‘Earnest Money’ shall mean 15% [(BSP Rate x Plot Area) + PLC]”

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“Article XII: EVENTS OF DEFAULT BY THE BUYER AND TERMINATION OF THIS AGREEMENT.

“1. xxxxxxxxxxxxxxxxxxxxxxxx

2. Upon the occurrence of any Event of Default, the developer may at its sole description, and without prejudice to its rights to enforce specific performance of this Agreement or any other right/remedy available under Applicable laws, call upon the Buyer by way of a written notice (“Default Notice”) to rectify/cure the Event of Default within the time period as may be specified therein. On the failure of the Buyer to do so and without prejudice to any other right or remedy available to the Developer shall have the right to terminate this Agreement under notice to the Buyer and the allotment of the Plot shall stand cancelled and on such cancellation/termination the Buyer shall be left with no lien, right, title, interest or claim of whatsoever nature in the said Plot. The Plot shall vest with the Developer absolutely and the Developer shall refund the amount received by the Developer from the Buyer against the Plot at such date (Subject to forfeiting/withholding/deducting there from an amount equivalent to the Earnest Money to the Buyer. It is hereby clarified that the Buyer shall not be entitled to any refund of the amounts paid by him or due from him towards service Tax. Maintenance Charges, interest on delayed payment(s) and the brokerage/commission paid by the Developer to any channel partner through whom the Buyer has applied for the Plot. Neither any charge, lien, claim, monetary or otherwise, shall lie against the Developer nor the same shall be raised otherwise or in any manner whatsoever by the Buyer. The refund shall be made by the Developer to the Buyer from the Sale proceed on resale of the Plot.”

31. Thus under the above said Article I (xiii) and Article XII (2) of the agreement the promoter has deducted an amount of Rs.66,76,002/- out of the total amount of Rs.1,09,32,453/- paid by the allottee i.e. 22.4% of the total sale consideration of Rs.2,98,07,359/-.

32. The legal position with regard to deduction of amount in case of default on the part of the allottees has been dealt in detail by Hon'ble Supreme Court in citations **Maula Bux v. Union of India – 1969 (2) SCC 522** and **Satish Batra -1969 (2) SCC 554** 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.”

33. In the case of **M/s DLF V/s Bhagwanti Narula decided on 06.01.2015 decided by the Hon'ble National Consumer Disputes Redressal Commission in Revision Petition No.3860 of 2014**, while discussing the cases of **Maula Bux (supra), Satish Batra (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 15 % 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. In para 13 of the said order of the Hon'ble National Consumer Disputes Redressal Commission, it is held that an amount exceeding 10% of total sale price cannot be forfeited by seller, since

forfeiture beyond 10% of the sale price would be unreasonable and only the amount which is paid at the time of concluding the contract can be said to the earnest money.

34. In the instant case, there is a breach of contract on the part of the allottees as they had not adhered to the payment schedule as per the agreement in spite of repeated demands/reminders. The total sale consideration of the plot is Rs.2,98,07,359/-, out of which the allottees have paid only an amount of Rs.1,09,32,453/-. The promoter had cancelled the allotment vide letter dated 29.04.2017 and forfeited the amount of Rs.66,76,002/- obviously as liquidated damages.

35. The claim for damages for breach of contract is governed by the provisions of Section 74 of the Indian Contract Act, 1872 (hereinafter called 'the Contract Act') as liquidated damages. The forfeiture of the earnest money along with brokerage paid, service tax, applicable delayed payment charges etc. as per Article I (xiii) and Article XII (2) of the agreement, is nothing but forfeiture of the liquidated damages which has been clarified by the Hon'ble Apex Court in **KAILASH NATH ASSOCIATES Vs. DELHI DEVELOPMENT AUTHORITY, (2015) 4 SCC 136.**

36. In case **Maula Bux v. Union of India** (Supra), the Hon'ble Apex Court has observed that 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 penalty. It was further laid down by the Hon'ble Apex Court in Maula Bux's case (Supra) as under: -

“Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.”

37. In view of the rule of law laid down by the Hon'ble Apex court in the cases referred to above, the person complaining the breach of contract is entitled for the liquidated damages mentioned in the contract, if the same is genuine and reasonable. But if the liquidated damages provided in the contract is unreasonable and by way of penalty, the claimant shall only be entitled to a reasonable compensation. However, there must be some loss. In the instant case, though the promoter has not adduced any evidence to establish the actual damage/loss but at the same time it cannot be stated that the promoter has not suffered any loss as the promoter has completed the project and obtained partial completion of the part in which the plot of

the allottees is situated from its own sources. Therefore, the promoter is entitled only to a reasonable compensation.

38. No other issue was pressed by the parties during arguments.

39. Thus, in view of the aforesaid legal position, the forfeiture by the promoter of the amount of Rs.66,76,002/- out of the total payment of Rs.1,09,32,453/- made by the allottees is unjust, unconscionable and unreasonable. The promoter is only entitled to a reasonable compensation 10% of the total sale consideration of Rs.2,98,07,359/- which is considered as reasonable and, therefore, is liable to be forfeited by the promoter.

40. Upon the cancellation of the unit on 29th of April, 2017, the promoter was obliged to reimburse an amount equivalent to i.e. Rs.79,51,717.1 (Rs.1,09,32,453/- minus 10% of Rs.2,98,07,359/-), which they failed to fulfil. The promoter has retained the sum since then. However, pursuant to the interim directions issued by the Hon'ble High Court on the 5th of February, 2019, the promoter has deposited Rs.60 lakhs into the home loan account of the allottees in the Bank on 1st of March, 2019. This transaction is substantiated by the bank's communication dated the 14th of March, 2019, addressed to the allottees, and has been duly submitted by the promoter in their appeal.

Therefore, the allottees are eligible for the following amounts:

- i) A refund of i.e. Rs.19,51,717.1 (Rs.79,51,717.1 minus Rs.60,00,000/-).
- ii) Interest calculated as per rule 15 of the rules i.e. SBI highest MCLR plus 2%, i.e. 10.75% per annum, on Rs.79,51,718/- (Rs.1,09,32,453/- minus 10% of Rs.2,98,07,359/-) from the date of cancellation, i.e. the 29th of April, 2017, until the actual realization of the amount.
- iii) An amount equivalent to interest calculated at 10.75% on the sum of Rs.60,00,000/- from the 1st of March, 2019, until the point of realization shall be subject to deduction from the aforementioned amount payable to the allottees.

41. Consequently, the impugned order passed by the learned Authority is modified in the manner indicated above and the appeals stand disposed of.

42. No order to costs.

43. The amount deposited by the promoter (in appeal no.463 of 2022) i.e. Rs.19,51,717/- with this Tribunal in view of the proviso to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016, along with interest accrued thereon, be sent to the learned Authority for disbursement to

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

44. The copy of this order be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

45. File be consigned to the record.

Announced:
January 08, 2024

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal

Anil Kumar Gupta
Member (Technical)

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Judgment-Haryana Real Estate Appellate Tribunal