[2025] 2 S.C.R. 343 : 2025 INSC 143

Godrej Projects Development Limited
v.
Anil Karlekar & Ors.

(Civil Appeal No. 3334 of 2023)

03 February 2025

[B.R. Gavai* and S.V.N. Bhatti, JJ.]

Issue for Consideration

Whether the National Consumer Disputes Redressal Commission (NCDRC) was justified in disposing of the consumer complaint filed by the respondents no. 1 and 2 thereby directing the appellant to deduct only 10% of the Basic Sale Price (BSP) towards cancellation of the complainants' apartment and refund the balance amount along with simple interest @ 6% p.a. from the date of each payment till the date of refund.

Headnotes†

Consumer Protection Act, 1986 – s.2(1)(r) – Consumer Protection Act, 2019 – s.2(46) – Complainants booked an apartment with appellant and submitted application money – Apartment Buyer Agreement was entered into between the parties – After completion of construction, appellant offered possession to the complainants – However, the complainants sought cancellation of the allotment and refund of the amount paid – Pursuant thereto, consumer complaint was filed – The NCDRC directed 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/- alongwith simple interest @ 6% p.a. from date of each payment till the date of refund – Correctness:

Held: The respondents had cancelled the deal since there was recession in the market – In the agreement between the parties, the complainants were required to pay earnest money deposit of 20% of the BSP, which undisputedly was 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

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in the agreement – 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 consist the obligations of the developer in the event it does not comply with the timelines and a very meagre compensation is provided to the apartment purchaser – It provides that 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 meagre 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 – Thus, the agreement was one-sided and totally tilted in favour of the developer – It is settled 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 – Further, the contractual terms which are *ex facie* one-sided, unfair and unreasonable would constitute unfair trade practice u/s. 2(1)(r) of the 1986 Act – 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 – There is no reason to upset the view consistently taken by the NCDRC – However, in the instant case, the NCDRC was not justified in awarding interest on the amount to be refunded – As 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 – There is a possibility that the respondents would have utilised the money which was payable by them to the appellant for purchasing another property at a lower rate – Since, appellant has already refunded an amount of Rs.22,01,215/- to the respondents – Therefore, the appellant directed to pay the balance amount of Rs.12,02,955/- [Rs.34,04,170/- minus Rs.22,01,215/-] to the respondents. [Paras 14, 17, 22, 24, 25, 26, 30, 39, 40, 41, 42, 44]

Case Law Cited

Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another **[1986] 2 SCR 278 : (1986) 3 SCC 156;** *Maula Bux v. Union of India* **[1970] 1 SCR 928 : (1969) 2 SCC 554 – relied on.**

Satish Batra v. Sudhir Rawal **[2012] 9 SCR 662 : (2013) 1 SCC 345;** *Desh Raj and others v. Rohtash Singh* **[2022] 18 SCR 65 : (2023) 3 SCC 714 – held inapplicable.**

Komal Aggarwal v. Godrej Projects Development Ltd., **Consumer Case No.2139 of 2018 dated 9.11.2022;** *DLF Ltd. v. Bhagwanti Narula,* **2015 SCC OnLine NCDRC 1613;** *Ramesh Malhotra and Another v. Emaar Mgf Land Limited and Another,* **2020 SCC OnLine NCDRC 789;** *Ireo Grace Realtech Private Limited v. Abhishek Khanna and Others* **[2021] 2 SCR 1 : (2021) 3 SCC 241;** *Pioneer Urban Land and Infrastructure Limited v. Govindan Raghavan* **[2019] 5 SCR 1169 : (2019) 5 SCC 725;** *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* **[2020] 9 SCR 136 : (2020) 16 SCC 512 – referred to.**

List of Acts

Consumer Protection Act, 1986; Constitution of India; Consumer Protection Act, 2019; Contract Act, 1872.

List of Keywords

Apartment Buyer Agreement; Cancellation of the allotment; Earnest money; Refund of money; Forfeiture of earnest money; Unfair and unreasonable contract; Unfair trade practice; Section 74 of the Contract Act, 1872; Section 2(46) of Consumer Protection Act, 2019; Section 2(1)(r) of Consumer Protection Act, 1986.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3334 of 2023

From the Judgment and Order dated 25.10.2022 of the National Consumers Disputes Redressal Commission, New Delhi in CC No. 262 of 2018

Appearances for Parties

Dhruv Mehta, Sr. Adv., Kapil Madan, Saurabh Gauba, Akshit Narula, Shailendra Pratap Singh, Randhir Kumar Ojha, Ms. Surabhi Kapur, Advs. for the Appellant.

Ashwarya Sinha, Aditya Malhotra, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

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, whereby the National Consumer Disputes Redressal Commission (hereinafter, "NCDRC") *disposed of* the Consumer Complaint filed by the Respondents No. 1 and 2 (hereinafter referred to as, "Complainants" or "Respondents") thereby 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/- minus Rs. 17,08,140/-) along with simple interest @ 6% per annum from the date of each payment till the date of refund within three 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 Senior 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***[1] and ***Desh Raj and others v. Rohtash Singh***[2] 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.***[3], ***DLF Ltd. v. Bhagwanti Narula***[4] and ***Ramesh Malhotra and Another v. Emaar Mgf Land Limited and Another***[5], 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***[6] and ***Pioneer Urban Land and Infrastructure Limited v.***

1 (2013) 1 SCC 345

2 (2023) 3 SCC 714

3 Consumer Case No.2139 of 2018 dated 9.11.2022

4 2015 SCC OnLine NCDRC 1613

5 2020 SCC OnLine NCDRC 789

6 (2021) 3 SCC 241

Govindan Raghavan[7] 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 an 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.

7 (2019) 5 SCC 725

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.

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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 whatsoever either 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 favour 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 as under:

> "Some of the promised connections from internal roads to externals have been abandoned. Overall the place falls 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 condition of forfeiture of 20% 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 amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply.
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> **16.** 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.
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> **17.** 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.
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> Notwithstanding 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 –
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> (i) Non-availability of steel, cement, other building materials, water or electric supply or labour, or
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> (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 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. Thereafter 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 meagre 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 meagre 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***[8], 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:

8 (1986) 3 SCC 156

> "**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 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 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 some illustrations. 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 upon 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 contract or 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 instalments 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 instalment 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 12 months after the end of the grace period, before serving a termination notice of 90 days on the appellant builder, and even thereafter, the appellant builder gets 90 days to refund only the actual instalment paid by the respondent flat purchaser, after adjusting the taxes paid, interest and penalty on delayed payments. In case of any delay thereafter, the appellant builder is liable to pay interest @9% p.a. only.
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> **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.
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> **6.6.** Section 2(1)(*r*) of the Consumer Protection Act, 1986 defines "unfair trade practices" in the following 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.…",
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> and includes any of the practices enumerated therein. The provision is illustrative, and not exhaustive.
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> xxx xxx xxx
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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 the agreement dated 8-5-2012 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.
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> **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[9].***

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***

9 (2020) 16 SCC 512

Rahman Khan and Aleya Sultana and others (supra) and ***Ireo 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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> xxx xxx xxx
>
> (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:-
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> (i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or
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> (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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> xxx xxx xxx
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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 fulfil 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 totally in favour 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 Bux v. Union of India***[10]:

10 (1969) 2 SCC 554

> **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* [1910 SCC OnLine All 98 : ILR (1911) 33 All 166]; *Mohd Habibullah* v. *Mohd Shafi* [1919 SCC OnLine All 87 : ILR 41 All 324]; *Bishan Chand* v. *Radhakishan Das*. [1897 SCC OnLine All 52 : ILR (1897) 19 All 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, inasmuch as, such a forfeiture does not amount to imposing a 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 them is 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.

Result of the case: Appeal partly allowed.

†*Headnotes prepared by:* Ankit Gyan