

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION  
NEW DELHI**

**FIRST APPEAL NO. 66 OF 2018**

(Against the Order dated 25/10/2017 in Complaint No. 350/2016 of the State Commission  
Haryana)

1. KAILASH KUMARI

W/O. SHRI. RAJESH. R/O. JOUSE NO.835, SECTOR-14.  
SONEPAT.

.....Appellant(s)

Versus

1. M/S. OMAXE LTD. & ANR.

THROUGH ITS CHAIRMAN/PRESIDENT. R/O. 7, LOCAL  
SHOPPING CENTRE, KALKAJI.

NEW DLEHI-19.

2. BRANCH MANAGER, M/S. OMAXE CITY.

G.T. ROAD.

SONEPAT.

.....Respondent(s)

**BEFORE:**

**HON'BLE DR. INDER JIT SINGH, PRESIDING MEMBER**

FOR THE APPELLANT : MR. MADHURENDRA KUMAR, ADVOCATE

FOR THE RESPONDENT : MR. KARANJOT SINGH MAINEE, ADVOCATE

MR. SAHIL CHOPRA, ADVOCATE

MS. CHARU SHARMA, ADVOCATE

**Dated : 09 April 2024**

**ORDER**

1. The present First Appeal (FA) has been filed by the Appellant against Respondent(s) as detailed above, under section 19 of Consumer Protection Act 1986, against the order dated 25.10.2017 of the State Consumer Disputes Redressal Commission, Haryana, Panchkula (hereinafter referred to as the 'State Commission'), in Consumer Complaint (CC) no. 350/2016 inter alia praying to set aside the order passed by the State Commission.
2. The Appellant was the complainant and the respondent(s) were OPs in the said CC/350/2016 before the State Commission. Notice was issued to the Respondent(s). Parties filed Written Arguments/Synopsis on 25.10.2023 (Appellant/Complainant) and 02.12.2022 (Respondents/OPs) respectively.
3. Brief facts of the case, as emerged from the FA, Order of the State Commission and other case records are that: -

Complainant booked a flat in Omaxe City project of the OP at Sonepat vide application dated 28.03.2013. Vide allotment letter dated 04.04.2013, OP allotted a flat no OWF/Ground/2700 in the project 'OMAXE WISTERIA FLOOR'. As per application, total consideration was Rs. 64,11,500/-, with BSP (Basic Sale Price) being Rs. 57,50,000/-. A booking amount of Rs. 5 lakhs was paid along with application. Complainant paid a total amount of Rs. 27,90,418/-. OP claims to have sent draft BBA (Builder Buyer Agreement) in original for signatures by the Complainant on 25<sup>th</sup> January 2014. However, the same was not signed, and a reminder letter dated 05.06.2014 was sent by OP. Complainant contends that she did not sign the BBA as some terms & Conditions of same were found unacceptable and conveyed the same to OP, but OP refused to amend the BBA. The Complainant further contends that upon inspecting the construction site, she discovered use of substandard materials by OPs, which raised concerns about safety. Despite raising concerns with OPs, Complainant claims to have received no satisfactory response. Hence, she sought refund of total amount deposited. OPs on the other hand contended that complainant failed to make payments towards sale consideration, resulting in forfeiture of the amount paid. State Commission relying on the judgement of this Commission in FA/06/2014 Randhir Singh vs. Omaxe Chandigarh Extension Developers (P) Ltd. decided on 27.11.2014, vide impugned order dated 25.10.2017, came to a conclusion that Complainant is entitled to refund of the amount deposited by her minus the earnest money of Rs. 5,75,000/- but she is not entitled to interest because there was lapse on her part qua signatures of agreement as well as deposit of amount.

Before State Commission, OP had argued that it was only after complainant did not pay despite many chances being given that the allotment was cancelled on 26.08.2013 and earnest money of Rs. 5,75,000/- was forfeited. In October, 2013, cancellation was revoked and unit was re-allotted. But the Complainant did not sign the agreement, so allotment was cancelled again on 01.09.2014 and Rs. 5,75,000/- earnest money was forfeited. On the other hand Complainant had argued that BBA sent to her was one sided, terms & Conditions were favorable to builder only, that is why it was not signed. The State Commission did not accept the contention of Complainant of materials being of sub-standard due to lack of evidence. Relying on conditions of booking application, State Commission observed that OPs were competent to cancel the allotment and forfeit the earnest money.

4. Vide Order dated 25.10.2017, the State Commission has directed OPs to refund the amount deposited by the complainant minus earnest money of Rs. 5,75,000/-, stating further that complainant is not entitled to Interest.

5. Appellant has challenged the Order dated 25.10.2017 of the State Commission mainly on following grounds:
- i. The appellant/complainant initially deposited Rs. 3,00,000/- with the respondents/OPs as a booking amount for a Block-A flat. However, the OPs later adjusted this amount towards a Block-F flat without issuing any receipt for the adjustment. Subsequently, when an agreement containing unfavorable terms was sent to the complainant in December 2013, they refused to sign it and requested a refund of the entire deposited amount along with interest. Despite reminders from the OPs, the complainant persisted in seeking a refund due to the unfinished state of the project and about construction quality. Subsequently, the complainant filed a complaint and the State Commission, in its order dated 25.10.2017, ordered a refund after deducting Rs. 5,75,000/-, which is a unjustified decision.
  - ii. The OPs failed to provide any evidence or communication regarding the cancellation or forfeiture of the deposited amount. Deducting Rs. 5,75,000/- as earnest money is unjustifiable in the absence of a forfeiture clause in the allotment letter. The State Commission erred in overlooking the complainant's consistent payments and concerns about construction quality, which negate any motive for ceasing payments or signing the agreement. In its order dated 25.10.2017, the State Commission failed to consider crucial facts and legal principles. The OPs introduced claims of cancellation and forfeiture only after the complaint was filed, without providing documentation or communication to substantiate their assertions. Additionally, they did not disclose the allotment of the flat to a new buyer, Sh. Rajesh Khatri, nor did they offer evidence to support their stance on the cancellation and subsequent allotment.
  - iii. The State Commission made a factual error in its decision dated 25.10.2017 by dismissing the complainant's claims due to the absence of formal correspondence with the OPs. It is unreasonable to assume that a diligent client or buyer, who had consistently made payments towards the allotment of a flat without delay for a year, would suddenly cease payments without reason or arbitrarily refuse to sign an agreement. Furthermore, the OPs only provided the Buyer's Agreement a year after payments and allotments began, in January 2014, despite transactions dating back to 2013. The complainant's decision to seek a refund was prompted by dissatisfaction with the construction materials, which they deemed to be sub-standard and potentially hazardous to their safety.
6. Heard counsels of both sides. Contentions/pleas of the parties, on various issues raised in the FA, based on their FA/Reply, Written Arguments, and Oral Arguments advanced during the hearing, are summed up below.

- i. The counsel for appellant/complainant argued that the complainant applied for the booking of a flat with the respondents/OPs in their Omaxe City project in Sonapat, paying an initial booking amount of Rs. 5,00,000/- on 28.03.2013, duly acknowledged by receipt No. 884304 dated 04.04.2013. Subsequently, the OPs allotted Flat No. OWF/GROUND/2700 in Omaxe Wisteria Floors, Block-F, Sonapat, and provided a customer ID No. OWF/43 to the complainant. The complainant diligently made installment payments to the OPs with an adjustment of Rs. 3,00,000/-, resulting in a total payment of Rs. 27,90,418/-. However, upon receiving the Builder Buyer's Agreement, the complainant found some terms and conditions unacceptable and conveyed her objections to the OPs. Despite this, the OPs refused to amend the agreement, leading to further correspondence between the parties. Subsequently, upon inspecting the construction site, the complainant allegedly discovered the use of sub-standard materials by the OPs, which raised concerns about safety. Despite raising these concerns with the OPs, the complainant claims to have received no satisfactory response. Consequently, due to dissatisfaction with the construction progress and concerns for safety, the complainant requested a refund of the total amount deposited with the OPs, indicating her disinterest in proceeding with the allotment.
- ii. The counsel alleges that the OPs continually delayed addressing her concerns and ultimately refused to refund the deposited amount. Left with no other recourse, the complainant filed a consumer complaint before the State Commission. In response to the complaint, the OPs claimed that they had sent a Builders/Buyers Agreement to the complainant, which she had not signed, and she had never requested amendments to the agreement. The OPs stated that the complainant failed to make the required installment payments toward the sale consideration of the flat, resulting in the forfeiture of the amount paid.
- iii. The counsel for Respondent/OPs argued that the appellant/complainant signed the application form and agreed to its terms, including the consequences of breaching those terms. Despite multiple reminders and demand letters, the complainant failed to make the required payments and did not respond to the OP's communications. The application form contained unambiguous forfeiture clauses, which the complainant disregarded. These clauses authorized the OP to forfeit the booking amount/earnest money in case of breach by the allottee, as a measure to protect the interests of the project and other allottees. Legal precedents, such as the case of **H.U.D.A. v. Kewal Krishan Goel** (1996) 4 SCC 249; **Sahara India Commercial Corpn. Ltd. Vs. P. Gajendra Chary III**, (2010) CPJ 190 (NC), support the builder's right to forfeit amounts paid by the allottee in case of default in payment. The principle of *volenti non fit injuria* also applies, suggesting that the complainant cannot seek compensation when they willingly breached the obligations outlined in the application form.

- iv. The forfeited amount of Rs. 5,75,000/- constitutes liquidated damages as specified in the application form. The complainant was informed of this provision at the time of signing the form. The ability to claim liquidated damages, as affirmed in legal precedents like **Kailash Nath Associates v. DDA** (2015) 4 SCC 136, validates the OP's action in this case. The complainant did not return the signed Builder Buyer Agreement within the stipulated time period despite multiple reminders from the OPs. The OPs, following the terms of the Application Form and after giving ample opportunities to the complainant to rectify the defaults, proceeded to cancel the allotment and forfeit the earnest money. This action was justified under the terms of the agreement and was upheld in **DLF Southern Towns Pvt. Ltd. vs. T.P. Balachandra Panicker**, 2015 SCC OnLine NCDRC 1501. The complainant, being in default, is not entitled to receive interest on the amount deposited by them. The National Commission in **Randhir Singh vs. Omaxe Chandigarh Extension Developers (P) Ltd.**, 2014 SCC OnLine NCDRC 782 supports this stance, as defaulters are not entitled to interest payments on their deposits. The counsel vehemently denies the complainant's allegations regarding the use of sub-standard construction materials and asserts that these claims are baseless and aimed at tarnishing the OP's reputation without any evidence to support them.
- v. The counsel contends that the OP fulfilled their duty to inform the complainant about the cancellation and forfeiture. They argue that disclosing details about the subsequent allottee was unnecessary as the complainant's rights ceased after the cancellation. The counsel disputes the complainant's claim of delayed allotment letter, providing evidence of prompt dispatch. They assert OP's compliance with the State Commission's order by paying Rs. 21,97,444/- to the complainant, as communicated in a letter dated 05.04.2018. This payment fulfills OP's obligations, warranting dismissal of the appeal with exemplary costs
7. We have carefully gone through the orders of the State Commission, terms and conditions of the booking application and other relevant records. Relying on the following condition of the application form, the State Commission has held that the OPs are entitled to forfeit earnest money of Rs.5,75,000/-, and also that complainant is not entitled for interest because there was lapse on her part qua signing of agreement as well as deposit of amount.

*“if, however, I/we cancel this application or I/we fail to sign/execute and return allotment letter/Buyer’s agreement within thirty (30) days from its dispatch by the company then the company may at its discretion treat my/our application as cancelled and the earnest money paid by me/us shall stand forfeited.”*

8. The above condition envisages signing of Buyer's Agreement by the complainant within 30 days from its despatch by the Company. Although no period is mentioned in the conditions of the application form as to within how much time the OPs should despatch the Buyer's Agreement, it ought to be done within a reasonable period from the signing of the application form, which is dated 28.03.2013. Even as per OP's own case, the draft agreement was sent to the Complainant first time on 25.01.2014, i.e. after a gap of 10 months, which was followed by a reminder dated 05.06.2014 only i.e. after a gap of four months. The OP has not placed on record the letter dated 25.01.2014 but only the reminder letter dated 05.06.2014. Further, the copy of the draft Buyer's Agreement claimed to have been sent along with letter dated 25.01.2014 has not been placed on record by the OPs. We are of the considered view that in the present case, the OPs itself have delayed the sending of the draft Buyers' Agreement to the complainant for signing by about one year. No doubt, the condition in the application form states that if the complainant/allottee fails to execute within 30 days of its dispatch by the Company, the Company may at its discretion treat the application as cancelled and forfeit the earnest money but the question that arises is, can a builder impose such unilateral condition on any allottee and subsequently add any further conditions in the Buyers' Agreement, which are not part of the application form and if any allottee disagrees with inclusion of such subsequent conditions, can the builder use the above stated condition of the application form to cancel the application and forfeit the money. It was held by the Hon'ble Supreme Court in **Ireo Grace Realtech Pvt.Ltd. Vs. Abhishek Khanna & Anr.** (2021) 3 SCC 241, that "*Developer cannot compel apartment buyers to be bound by one-sided contractual terms contained in apartment buyers agreement*". In the instant case, it is a specific case of the complainant that he did not sign the Buyers' Agreement as she found some terms and conditions unacceptable and conveyed her objections to the OP and despite this, OP refused to amend the agreement leading to further correspondence between the parties.
9. In view of the foregoing, we are of the considered view that in the given facts and circumstances of the present case, OPs are not justified in forfeiting the earnest money of the complainant on the ground of not signing the Builder Buyer Agreement and the complainants were justified in seeking refund on account of OPs not agreeing to amend the objectionable terms and conditions. As neither party has placed on record the draft Builder Buyer Agreement sent by the OPs vide letter dated 25.01.2014, it is not possible to specifically state whether this draft Builder Buyer Agreement contained any terms and conditions beyond those contained in the application form. As OPs have not taken any specific plea that the Builder Buyer Agreement contained the only conditions which were part of the application form, and the complainant having raised specific objections to certain terms and conditions, we are of the view that in the present circumstances, OPs are not entitled to forfeit the earnest money. Accordingly, hold that State Commission went wrong in ordering refund of the money paid by the complainant minus the forfeiture of the earnest money, that too without interest. Hence the order of the State Commission cannot be sustained and needs modification. Accordingly, we allow the complaint with modified relief as follows.

10. OPs are directed to refund the entire principal amount of Rs.27,90,418/- deposited by the complainant, with interest @9% p.a. from the date of each deposit till the date of actual refund. The entire amount shall be paid by the OPs within 30 days of this order, failing which, the amount payable at the end of 30 days, shall carry interest @12% p.a.
  
11. First Appeal is disposed off accordingly. The pending IAs in the case, if any, also stand disposed off.

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**DR. INDER JIT SINGH**  
**PRESIDING MEMBER**