**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION**

**NEW DELHI**

**CONSUMER COMPLAINT NO. NC/CC/327/2019**

**WITH**

**NC/IA/9256/2023 (DIRECTIONS)**

ANITA YADAV & ANR. .....Complainant(s)
PRESENT ADDRESS - R/O D-75/2 STREET NO-05 MAHAVEER ENCLAVE PALAM NEW DELHI-110045

Versus

EXPERION DEVELOPERS PRIVATE LIMITED & 2 ORS. .....Opposite Party(s)
PRESENT ADDRESS - THROUGH ITS DIRECTOR AND C.E.O/M.D REG OFFICE-F-9, FIRST. MANISH PLAZA 1, PLOT NO7 MLU., SECTOR 10, DAWRKA, NEWA DELHI-110075
SH. HEMANT TIKKO, DIN NO-01880241
PRESENT ADDRESS - DIRECTOR EXPERION DEVELOPERS PVT. LTD. REGD. OFFICE -F-9,FIRST FLOOR, MANISH PLAZA 1, PLOT NO7 MLU, SECTOR 10, DAWRKA, NEW DELHI-110075
RAKESH KAUL C.E.O/ M.D DIN NO-00023017
PRESENT ADDRESS - DIRECTOR EXPERION DEVELOPERS PVT. LTD. REGD. OFFICE -F-9,FIRST FLOOR, MANISH PLAZA 1, PLOT NO7 MLU, SECTOR 10, DAWRKA, NEW DELHI-110075

**BEFORE:**

**HON'BLE MR. JUSTICE SUDIP AHLUWALIA , PRESIDING MEMBER**

**HON'BLE DR. SADHNA SHANKER , MEMBER**

**FOR THE COMPLAINANT:** MR. HARSH KUMAR, ADVOCATE MR. NAVEEN KUMAR, ADVOCATE MR. ABDUL HAMEED KHAN, ADVOCATE D. MANSHIKHA INDORA, ADVOCATE

**FOR THE OPPOSITE PARTY:** MR. AMIT AGARWAL, ADVOCATE MR. ESHAN BANDAUNI, ADVOCATE

**DATED: 25/09/2026**

**ORDER**

JUSTICE SUDIP AHLUWALIA, MEMBER

This Consumer Complaint has been filed by the Complainants, alleging deficiency in service on the part of Opposite Party No.1, M/s. Experion Developers Pvt. Ltd., in relation to

allotment of residential Apartment/Unit No. B-3/0704, situated on the 7th Floor, Block-B, Tower-3, in the project known as 'The Heartsong', Sector-108, Gurgaon, Haryana. The Opposite Party No.2, Shri Hemant Tikko, is stated to be a Director of Opposite Party No.1, while Opposite Party No.3, Shri Rakesh Kaul, is stated to be its CEO/MD.

2. Briefly stated, the case of the Complainants is that in the year 2012 they intended to purchase a residential property in Gurgaon and approached the representatives of Opposite Party No.1 in respect of its project 'The Heartsong'. According to them, the project was represented through a brochure containing the project plans and other salient features. They allege that the brochure did not clearly disclose the carpet area or super area of the Apartment and that, relying upon the representations made by the representatives of Opposite Party No.1, they decided to book the subject unit. An amount of Rs.2,00,000/- was paid as booking amount through Cheque No.760187 dated 27.10.2012. Thereafter, a Provisional Allotment Letter dated 13.12.2012 was issued in respect of Unit No. B-3/0704. The said letter described the Apartment as having a 'Sale Area' of approximately 163.32 sq. metres/1,758 sq. ft., and stated the total sale consideration at Rs.1,09,66,150/-.

3. The Complainants state that thereafter they made payments towards the agreed consideration from time to time. They paid Rs.5,00,000/- on 12.12.2012 through Demand Draft No.026716 dated 07.12.2012; Rs.10,44,000/- on 23.02.2013 through Cheque No.476203 dated 23.02.2013; Rs.7,00,000/- on 09.04.2014 through Cheque No.512978 dated 09.04.2014; and Rs.2,00,000/- on 18.12.2014 through Cheque No.5019817 dated 14.12.2014. According to the Complaint, the total amount paid by them came to Rs.26,44,000/-.

4. The grievance of the Complainants essentially arose from the area of the Apartment. They have stated that on 01.03.2015 they inspected the project/site and allegedly found that the actual carpet area of the Apartment was only about 930 sq. ft., as against the 1,758 sq. ft. which, according to them, had been represented as the area of the Apartment. They claim that they immediately raised the issue with the representatives of Opposite Party No.1 and were assured that the carpet area would not be reduced. Thereafter, on 01.08.2016, the Complainants sent an e-mail to Opposite Party No.1 seeking cancellation of the Unit and refund of the amount paid by them. In the said e-mail, they also referred to their financial difficulties and stated that, upon visiting the Unit, they felt that the Flat was much smaller than what had been represented and that there was acute shortage of space in the Apartment.

5. The said e-mail dated 01.08.2016 was replied to by Opposite Party No.1 on 05.08.2016. The reply, sent by its Customer Services representative, Himanshu Sardana, stated that the super area and dimensions of the Flat had been made available to the Complainants at the time of booking and that the carpet area and dimensions were the same as those made available at the time of booking. The Complainants were also referred to the dimensions contained in the Apartment Buyer Agreement. Opposite Party No.1 further stated that there was no provision for cancellation and refund under the

Application/Apartment Buyer Agreement and requested the Complainants to make partial payments in the meantime so as to minimise the interest accruing on delayed payments.

6. The correspondence between the parties thereafter substantially revolved around the outstanding instalments. Opposite Party No.1 issued various payment requests and reminders, calling upon the Complainants to clear the outstanding instalments and cautioning them that delayed payments would attract interest at the contractual rate of 18% per annum. A Final Notice dated 18.11.2016 was also issued, granting the Complainants a final opportunity to regularise the allotment by clearing the outstanding amount. The Final Notice stated that the outstanding amount, together with delayed payment interest, was required to be paid by 03.12.2016, failing which, the allotment would be terminated/cancelled.

7. Eventually, Opposite Party No.1 issued a cancellation letter dated 28.02.2017. The letter stated that despite the payment requests, reminders and Final Notice, the Complainants had failed to clear the outstanding dues and were consequently in continuing breach of the Apartment Buyer Agreement dated 12.07.2013. The allotment was accordingly cancelled under Clause 5.1 of the Agreement. The letter purported to forfeit amounts towards earnest money, delayed payment interest and brokerage/commission. The calculation contained in the cancellation letter is, however, internally inconsistent and does not lend itself to a clear determination of the precise amount purportedly forfeited at that stage.

8. The Complainants thereafter addressed an e-mail dated 07.03.2017 seeking cancellation and refund of the amount paid. Subsequently, by letter dated 18.03.2017, they again raised the issue regarding the area of the Apartment, alleged that the Apartment was much smaller than the area initially assured, and sought refund of the amount paid. Opposite Party No.1 replied by letter dated 08.05.2017, reiterating that the allotment had been cancelled on account of the Complainants' continuous failure to make payment of the outstanding dues and denying the allegation regarding reduction in area. It further maintained that the forfeiture was in accordance with the Apartment Buyer Agreement dated 12.07.2013.

9. The Complaint came to be filed in 2019. It was admitted by this Commission vide Order dated 18.07.2019, and the Opposite Parties were directed to file their Written Version within the maximum period prescribed under the Consumer Protection Act, 1986. Notice was served upon all the three Opposite Parties on 03.08.2019. However, Opposite Party Nos. 2 and 3 neither entered appearance nor filed their Written Version. Vide Order dated 17.12.2019, this Commission, noting that the maximum period of 45 days had expired, directed that Opposite Party Nos.2 and 3 be proceeded against ex-parte and closed their right to file Written Version. The contest, therefore, has substantially been by Opposite Party No.1.

10. In its Written Version, Opposite Party No.1 has denied the allegation that the Complainants were ever promised or represented a carpet area of 1,758 sq. ft. It has specifically relied upon the Booking Application, the Provisional Allotment Letter and the Apartment Buyer Agreement to contend that the area of the Apartment was consistently described as the 'Sale Area' of approximately 1,758 sq. ft. and not as carpet area. According to Opposite Party No.1, the Complainants themselves signed the relevant documents and were fully aware of the distinction between sale area and carpet area. It has relied upon the definition of 'Sale Area' contained in the contractual documents, which includes covered area, balconies/decks, areas under columns and walls and proportionate common areas and facilities.

11. Opposite Party No.1 has further contended that the Complainants defaulted in making the instalments despite repeated demands and reminders and that the cancellation was consequently effected strictly in terms of Clause 5.1 of the Apartment Buyer Agreement. It has denied any fraudulent representation or concealment and has asserted that the first communication concerning the alleged shortage in carpet area was received only on 01.08.2016, despite the Complainants' allegation that they had noticed the alleged discrepancy on 01.03.2015. It has accordingly submitted that the Complaint was barred by limitation. The Opposite Party has also relied upon Clause 5.1 of the Agreement to contend that liquidated damages equivalent to 15% of the basic price, car parking charges, PLC, statutory taxes, interest and brokerage/commission were liable to be forfeited upon default and cancellation.

12. Opposite Party No.1 has further relied upon the fact that the Apartment was described as 'Sale Area' in the contractual documents and has produced an Architect's Certificate. The Architect's Certification records that the area of Unit No. B3/0704 was calculated on the basis of the definition of 'Sale Area' contained in the Apartment Buyer Agreement and also refers to the approved drawings and Occupation Certificate issued for the project. Thus, according to Opposite Party No.1, the allegation that 1,758 sq. ft. was represented as carpet area is misconceived.

13. The Complainants, in their Rejoinder, have denied the aforesaid defence and reiterated that the material representations made at the stage of booking gave them the impression that 1,758 sq. ft. represented the usable/liveable area of the Apartment. They have contended that merely mentioning 'Sale Area' in the subsequent contractual documents could not cure the alleged lack of transparency regarding the actual carpet area. They have further denied that their failure to make subsequent payments amounted to an independent and wilful default, asserting that the withholding of further payments was a consequence of their discovery of the alleged discrepancy regarding the size of the Apartment. They have also challenged the forfeiture as excessive and arbitrary and maintained that the amount deposited by them could not have been wholly forfeited.

14. The Complainants filed their Evidence by way of Affidavits. Affidavits for the Complainants were sworn by Complainant No.1, Ms. Anita Yadav.

15. Heard Ld. Counsel appearing for the parties and perused the material available on record. The principal question which arises for consideration is whether, even assuming that the cancellation of the allotment on account of the Complainants' failure to adhere to the payment schedule was justified, could the Opposite Party No.1 lawfully forfeit the entire amount deposited by the Complainants or an amount in excess of what can reasonably be treated as earnest money.

16. At the outset, we find considerable force in the submission of Opposite Party No.1 that the principal allegation of the Complainants regarding representation of 1,758 sq. ft. as carpet area is not borne out by the contemporaneous contractual documents. The Provisional Allotment Letter dated 13.12.2012 expressly described the area as 'Sale Area' of approximately 163.32 sq. metres/1,758 sq. ft. The Unit Cost Details also separately identify the figure of Rs.96,69,000/- as the Basic Sale Price and describe the sale area as 1,758 sq. ft. The floor plan placed on record also bears the notation 'SALE AREA – 1758 SQFT. (163.32 SQMT.)'. In these circumstances, the allegation that the contractual representation itself was of 1,758 sq. ft. carpet area cannot be accepted merely on the basis of the subsequent perception of the Complainants. The documentary material, on the contrary, establishes that the contractual expression used by the parties was 'Sale Area'

17. The Complainants nevertheless did have a legitimate grievance in seeking cancellation of the allotment once they decided not to proceed with the transaction. Their case as to the actual area may not justify a finding of fraud or a conclusion that the OP had represented 1,758 sq. ft. as carpet area, but that circumstance does not confer upon the developer an unfettered right to appropriate whatever amount it chooses from the money deposited by the consumer. The contractual stipulation has to operate within the parameters of reasonableness and the law governing forfeiture.

18. It is significant that the Unit Cost Details placed on record show the Basic Sale Price as Rs.96,69,000/-. Opposite Party No.1 itself subsequently, vide letter dated 11.11.2020, stated that an amount of Rs.26,26,734/- had been paid by the Complainants and that it had forfeited Rs.10,79,035/-, describing the latter as 10% of the total cost of the Apartment, and refunded Rs.15,47,699/- through Cheque No.602375 dated 10.11.2020. The letter issued by Opposite Party No.1 itself further states that the amount of Rs.15,47,699/- was being refunded without prejudice to its rights and was liable to be adjusted against whatever liability might ultimately be determined by this Commission. Thus, the said amount has to necessarily be given credit while determining the final liability.

19. The legal position regarding forfeiture of earnest money in transactions relating to residential apartments is now well settled. This Commission In various cases has held that, in the absence of evidence of actual loss, forfeiture exceeding 10% of the sale price cannot be regarded as reasonable. The aforesaid principle has also been upheld by the

Hon'ble Supreme Court in 'Godrej Projects Development Limited v. Anil Karlekar & Ors., Civil Appeal No.3334 of 2023, decided on 03.02.2025, 2025 INSC 143'. The Hon'ble Supreme Court considered a substantially similar situation involving cancellation of an Apartment and a contractual stipulation permitting forfeiture of 20% of the Basic Sale Price. After examining various cases dealing with similar aspect, the Hon'ble Supreme Court held that the consistent view of the NCDRC that 10% of the BSP is a reasonable amount liable to be forfeited as earnest money called for no interference. The Court specifically declined to interfere with the direction limiting forfeiture to 10% of the BSP.

20. Applying the aforesaid principles to the present case, even if we proceed on the basis that the Complainants committed default in making payments and that the cancellation of the allotment under Clause 5.1 was contractually permissible, the right to cancel cannot be equated with an unrestricted right to forfeit the entire amount deposited. There is no material on record establishing that the Opposite Party No.1 had suffered any actual loss corresponding to the amount sought to be forfeited. The Apartment continued to remain an asset of the Developer and the Developer itself subsequently refunded a substantial part of the amount. The forfeiture, therefore, cannot be permitted beyond a reasonable amount representing earnest money.

21. In view of the foregoing discussion, while we are not persuaded to accept the Complainants' allegation that the documentary record establishes that 1,758 sq. ft. was represented as the carpet area of the Apartment, we are equally unable to uphold the forfeiture effected by Opposite Party No.1 beyond the permissible limit of 10% of the Basic Sale Price. The cancellation of the allotment, insofar as it proceeded on the Complainants' admitted failure to make the subsequent instalments, may stand; However, the financial consequences flowing from such cancellation must conform to the law governing reasonable forfeiture of earnest money.

22. We accordingly hold that Opposite Party No.1 could not have forfeited more than 10% of the Basic Sale Price. As the Basic Sale Price reflected in the Unit Cost Details is Rs.96,69,000/-, the maximum amount which could reasonably be retained towards earnest money is Rs.9,66,900/-. The amount of Rs.10,79,035/- purportedly forfeited by Opposite Party No.1 under its subsequent refund calculation is thus also liable to be adjusted/restricted to the permissible amount of Rs.9,66,900/-.

23. We may also note that during the pendency of the proceedings, Opposite Party No.1 issued Cheque No.602375 dated 10.11.2020 for Rs.15,47,699/- in favour of the Complainants. The Complainants received the cheque, though under protest and without accepting it as a full and final settlement. The OP itself subsequently confirmed that the said amount was to be adjusted against any liability determined by this Commission. Consequently, while determining the amount now payable, credit for the sum of Rs.15,47,699/- already refunded has necessarily to be given.

24. The total amount paid by the Complainants shall first be reduced by the amount permissible to be forfeited towards earnest money, i.e., 10% of the Basic Sale Price. The

amount remaining thereafter shall constitute the refundable amount. The amount of Rs.15,47,699/- already refunded by Opposite Party No.1 shall first be appropriated towards the interest accrued on the respective amounts deposited by the Complainants, calculated @ 6% per annum from the respective dates of deposit up to the date of such refund, i.e., 10.11.2020. Any balance remaining out of the said amount after adjustment of the accrued interest shall thereafter be appropriated towards the outstanding principal amount. The principal amount, if any, still remaining payable after such adjustment shall carry simple interest @ 6% per annum from 10.11.2020 till the date of actual realization.

25. Accordingly, the Consumer Complaint is partly allowed with the following directions:

(i) Opposite Party No.1 shall be entitled to retain/forfeit only 10% of the Basic Sale Price of Rs.96,69,000/-, i.e., Rs.9,66,900/-, towards earnest money and to refund balance of the payment received by it from the Complainant, with interest @ 6% per annum.

(ii) The amount of Rs.15,47,699/- already refunded to the Complainants shall be appropriated first towards the interest accrued on the refundable amounts, calculated @ 6% per annum from the respective dates of deposit up to 10.11.2020. The balance amount, if any, remaining thereafter shall be adjusted towards the outstanding principal amount.

(iii) The principal amount remaining payable after the aforesaid adjustments shall carry simple interest @ 6% per annum from 10.11.2020 till the date of actual realization.

(iv) Opposite Party No.1 shall pay the amount so determined, together with interest as aforesaid, within three months from the date of this order, failing which the entire outstanding amount shall carry interest @ 9% per annum from the date of default till realization.

26. There shall be no Order as to costs.

27. The Complaint stands disposed of in the above terms.

28. Pending Application(s), if any, shall also stand disposed of as having been rendered infructuous.

**.....J**
**SUDIP AHLUWALIA**
**PRESIDING MEMBER**

**.....**
**DR. SADHNA SHANKER**
**MEMBER**