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# Ask for a refund

Parties making a property transaction have to understand when the earnest money can be rightfully forfeited

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## htestates LEGAL REMEDIES

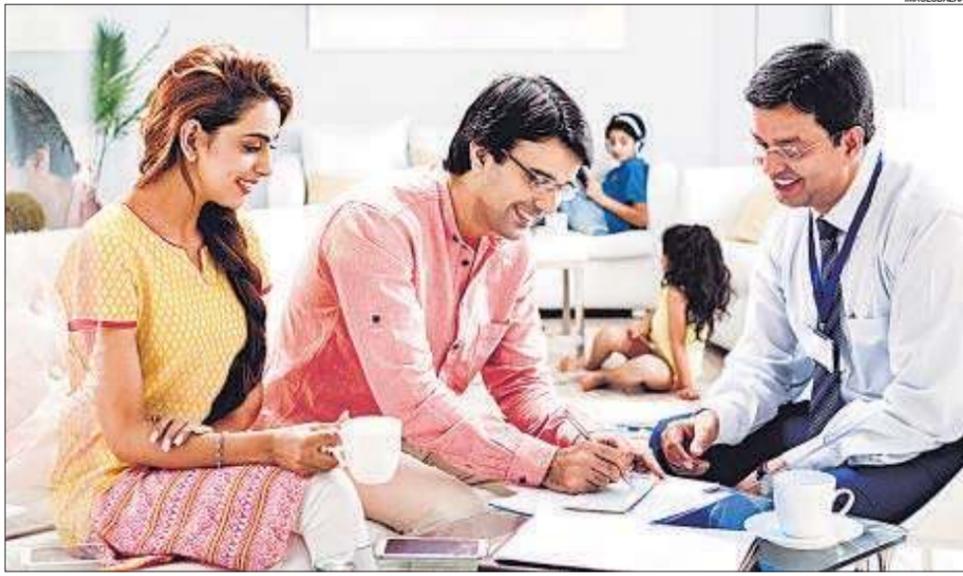
**E**arnest money is the deposit paid by a buyer at the time of entering into a contract for purchase of property, indicating his seriousness in making the transaction. It essentially represents a guarantee that the buyer will fulfill his obligations laid down in the contract. Thus, giving earnest money serves two key purposes – one, it acts as part-payment of the purchase money and two, it is security for the performance of the contract.

In real estate transactions, generally 10-15% of the consideration is treated as 'earnest money' which the seller has the right to forfeit in case of non-performance/breach of payment terms by the purchaser. In under-construction projects also, the booking amount paid by the allottees/buyers is treated as earnest money. The builder retains the right to forfeit the earnest money in case of non-payment by allottees as per the installment plan or demand.

In Haryana Urban Development Authority and

another v. Kewal Krishan Goel (1996) case, the Supreme Court addressed the issue of forfeiture of earnest money by the seller/builder. It clarified that earnest money is a part of the purchase price when the transaction gets through.

Conversely, the same is forfeited when the transaction falls through due to the fault or failure of the buyer. In case of default by the buyer, the seller is entitled to forfeit the earnest money. For example, if an allottee accepts the allotment and after making additional deposits on an installment basis intimates the seller/builder that he will not be in a position to pay up the balance amount, his request for a refund will not be justified. This is because according to the payment plan, his failure to pay the rest of the installments is nothing but a default. Therefore, the seller/builder would be justified in forfeiting



**Earnest money indicates a homebuyer's seriousness towards a realty transaction. It essentially represents a guarantee that he will fulfill his obligations laid down in the contract. The builder retains the right to forfeit the earnest money in case of non-payment by the allottee**

the earnest money.

Further, in the matter of Satish Batra v. Sudhir Rawal (2012), the question again surfaced as to whether a seller is entitled to forfeit the earnest money in case of the sale of an immovable property falls through due to the fault or failure of the buyer. This case also examined the technical difference between the terms earnest money and part-payment or advance money.

In this regard, the Hon'ble Supreme Court observed that

in order to determine whether the amount paid by a buyer can be treated as earnest money (and hence is liable to be forfeited by the seller) the mere description of words used in the agreement is not sufficient. Rather, courts would take into account the nature of the sum paid, the terms of the contract, intention of the parties and surrounding circumstances relevant to each case.

The Hon'ble Supreme Court held that in order to justify forfeiture of earnest money, the

terms of the contract should be clear and explicit.

It has often been alleged that the builders misuse the leverage they have over a consumer and wrongfully forfeit amounts. Because of the growing number of such instances, cases where earnest money has been rightfully forfeited have also come under the purview of litigation. Needless to say this is causing unnecessary trouble to both the parties involved.

Therefore, it is imperative that both parties understand

the true concept of earnest money and the instances when it can be rightfully forfeited. The courts have suitably clarified the concept of earnest money and situations when it can be rightfully forfeited.

**To be continued**

The author is senior partner at Zeus Law, a corporate commercial law firm. One of its areas of specialisations is real estate transactional and litigation work. If you have any queries, email us at ht@zeus.firm.in



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**LAW BOOK**

Sunil Tyagi

I am a person of Indian origin and hold a US citizenship. I have recently purchased a house in Delhi. Am I required to file any documents with the Reserve Bank for the same?

- Shantanu Roy

An NRI/PIO who has purchased residential/commercial property under general permission is not required to file any documents/reports with the Reserve Bank of India.

My father had purchased a flat in north Delhi from his own funds. My late father bequeathed the flat solely to my elder brother vide a registered will. Do I have a share in the flat?

- Sourabh Tomar

Since the said property was a self-acquired property of your father, he is free to dispose/bequeath it to anyone. You shall not be entitled to any share in the said property.

I have already executed a will but want to make some changes in it. Is it safe to execute a new will or will a codicil suffice?

- Rajini Sachdev

A codicil only amends a previously executed will. Hence, the intention of the testator has to be carried out in terms of the will read with the codicil. The codicil will not supersede the entire will. If you wish to make only a few changes in your will, it is simpler to execute a codicil instead of re-writing the entire will. Your codicil must clearly set out the changes in the manner of inheritance. If you wish to make many or significant changes

with respect to your heirs and manner of inheritance, you may execute a new will instead. Once executed, the new will shall be considered as your final will and shall supersede your previous will/s.

My widowed mother executed a gift deed of one of her properties in my favour a year ago, which was not registered. Thereafter, I allowed my mother and brother to stay in the property. Now my mother has expired and I have asked my brother to vacate the property. However, he has refused to do so. How can I get back possession of my property?

- Snigdha Shah

As per applicable law, gift deed of an immovable property is compulsorily registrable. Unregistered gift deed does not transfer and confer any title in the property in favour of transferee. Accordingly, you cannot claim title in the property on basis of the said unregistered gift deed. You may further note that since the gift deed is not registered and the time period for registration of a document as prescribed under the applicable law has already lapsed, the gift deed cannot be registered now.

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**CHEQUE BOOK**

Harsh Roongta

I need a home loan and my salary is ₹32,500. I also earn some incentives. What are the options available to me?

- Sharad Ahuja

Lenders normally consider the incentives if they see that you have consistently earned sizeable amounts (of incentives) over consecutive quarters in the past. However, there might be variations in terms of the exact amount. If this is the case, your incentives shall most definitely be taken into

account while calculating your loan amount eligibility.

On the basis of ITR/Form 16 of the last two years, you can get up to 4 to 4.5 times of your annual gross income (that includes incentives and other variable income components) as a home loan or up to maximum of 80% (90% for loan amount below ₹20 lakh) of the agreement value of the property as a home loan. The overall eligibility will be based on your income, your regular outgo-

ings and repayment track record.

I availed a home loan from a private bank in December 2012. The variable rate of interest was 10.5% and the EMI started from February 1, 2013. However, before my first EMI, RBI had reduced the rate for new loans to 10.25%. Hence, I did not get the benefit. The same bank increased the ROI to 10.75% in September 2013 without any intimation and consequently my 20-year long EMI has now increased to over 21 years. Can the bank do this without informing me and will my rate of interest be reduced as per the recent rate cut by RBI?

- Sagarika Dhulia

The changes in RBI policy rates do not automatically impact changes in the lender

reference rates.

It is a known fact that lenders are hesitant to reduce the base rate (BR) when interest rates fall and hence the consumer rarely gets the benefit when the interest rates are reduced. To say the least, this does not happen immediately.

However, at any given point of time, if you feel that the rate of interest being charged on your loan is higher as compared to the prevailing market rates or the rate being offered to new customers, you can transfer your existing loan to another lender.

You will need to have a good track record of payment of your EMIs in order

to secure an offer from another bank that will replace your existing loan. No prepayment charges are payable on transfer of a floating rate home loan for banks and housing finance companies presently.

However, you may have to pay some processing fee to the prospective lender. Remember not to pay processing fees plus legal fees and valuation fee more than 0.50% of the loan amount or ₹10,000/ (whichever is lower) plus service tax.

I want to take a home loan in which I want my wife to be the co-applicant (50:50). What documents are required to prove that my wife and I

are paying EMI in the same ratio? Will it be mentioned in the loan documents?

- Rohan Mandar

In case of a jointly owned property and a joint loan, each of you can claim tax benefits to the extent of your respective shares in the loan. In case the share of each person is not defined in the property agreement, you can record the same by way of a separate agreement to specify a certain percentage. However, this is not required to be mentioned in the loan documents.

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