

**H. P. STATE CONSUMER DISPUTES REDRESSAL  
COMMISSION SHIMLA**

**First Appeal No. : 187/2017**  
**Date of Presentation: 01.05.2017**  
**Order Reserved On : 08.09.2017**  
**Date of Order : 26.02.2018**

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H.P. Housing & Urban Development Authority (HIMUDA)  
Nigam Vihar Shimla-2 H.P. through its Chief Executive Officer.

..... Appellant/Opposite party

*Versus*

Atul Marwaha s/o Shri N.K. Marwaha r/o House No.204,  
Phase 3B-1 SAS Nagar Mohalli.

..... Respondent /Complainant

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**Coram**

**Hon'ble Justice P.S. Rana (R) President**  
**Hon'ble Mr. Vijay Pal Khachi Member**

Whether approved for reporting?<sup>1</sup> Yes.

**For Appellant : Mr. Swaran Sharma Advocate.**  
**For Respondent : Mr. Ferry Sofat Advocate.**

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**JUSTICE P.S. RANA (R) PRESIDENT:**

**ORDER:-**

1. Present appeal is filed under section 15 of Consumer Protection Act 1986 against order dated 22.02.2017 passed by Learned District Forum in consumer complaint No.02/2016 title Atul Marwaha Versus H.P. Housing and Urban Development Authority.

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<sup>1</sup> Whether reporters of the local papers may be allowed to see the order? Yes.

**Brief facts of Consumer Complaint:**

2. Complainant filed consumer complaint under section 12 of Consumer Protection Act 1986 against opposite party pleaded therein that complainant applied for allotment of category-III flat under Partial Self Financing Scheme in Housing Colony at Mandhala (Baddi) in response to the advertisement published by opposite party in newspapers for the allotment of flats. It is pleaded that complainant deposited amount of Rs.90000/- (Ninety thousand) vide letter dated 28.07.2007. It is further pleaded that complainant was declared successful in the draw by opposite party vide letter No. HIMUDA-Admn(b) PSFS-Cat-III/F (Mandhala) dated 26.05.2008 and was allotted Flat No.201 Block C-1 Housing Colony Mandhala (Baddi) under Partial Self Financing Scheme. It is further pleaded that complainant deposited all installments amounting to Rs.450000/- (Four lac fifty thousand). It is further pleaded that after allotment of flat complainant was expecting that possession of flat would be handed over to the complainant within a period of two years. It is further pleaded that more than 7 years have elapsed but possession of flat has not been handed over to the complainant. It is further pleaded that on dated 29.06.2015 complainant sent letter to the opposite party for surrendering

flat due to inordinate delay. It is further pleaded that opposite party cancelled the allotment with immediate effect and refunded Rs.360004/- (Three lac sixty thousand four) vide cheque No. 274894 dated 06.08.2015 and deducted Rs.90366/- (Ninety thousand three hundred sixty six) under clause 12(ii) of the brochure. It is further pleaded that complainant sent a letter to the opposite party on dated 16.09.2015 to refund Rs.90366/- (Ninety thousand three hundred sixty six) alongwith interest but opposite party did not give any response. Complainant sought relief of refund of earnest amount to the tune of Rs.90366/- (Ninety thousand three hundred sixty six) alongwith interest. Complainant also sought additional relief to the effect that opposite party be ordered to pay interest till date on the whole amount of Rs.450000/- (Four lac fifty thousand) which opposite party kept for more than 7 years. In addition complainant also sought relief of payment of Rs.100000/- (One lac) towards mental agony and harassment. In addition complainant also sought relief of payment of Rs.5500/- (Five thousand five hundred) towards costs of litigation.

**3.** Per contra version filed on behalf of opposite party pleaded therein that complainant is estopped to file present complaint on account of his own act and conduct. It is pleaded that terms and conditions of brochure are binding

upon complainant. It is further pleaded that complainant has concealed major material facts from learned District Forum and did not approach learned District Forum with clean hands. It is further pleaded that period of 2 years for offering possession was tentative in nature. It is further pleaded that project was a big project wherein 800 flats of various categories including the flat of complainant were constructed. It is further pleaded that allotment has been cancelled and amount has been refunded to the complainant as per terms and conditions of the allotment letter and brochure. It is further pleaded that allotment was cancelled as per request of complainant and amount was deducted strictly as per terms and conditions of allotment letter. It is further pleaded that opposite party offered possession in the month of February/March 2016 to all the allottees including the complainant after receiving the development completion report. It is further pleaded that opposite party did not commit any deficiency in service. Prayer for dismissal of complaint sought.

**4.** Complainant filed replication and reasserted the allegations mentioned in the complaint.

**5.** Learned District Forum partly allowed the complaint and ordered opposite party to refund Rs.450000/-

(Four lac fifty thousand) alongwith interest @ 9% per annum from the dates of deposits till payment. Learned District Forum further ordered that opposite party could deduct Rs.360004/- (Three lac sixty thousand four) i.e. Amount already paid vide cheque No. 274894 dated 06.08.2015 from the total amount payable to the complainant. Learned District Forum further ordered that in addition complainant would be entitled to compensation of Rs.20000/- (Twenty thousand) for mental agony and harassment. Learned District Forum further ordered that in addition complainant would be entitled to Rs.5000/- (Five thousand) towards litigation charges.

**6.** Feeling aggrieved against order passed by Learned District Forum opposite party filed present appeal before State Commission.

**7.** We have heard learned advocates appearing on behalf of parties and we have also perused entire record carefully.

**8.** Following points arise for determination in present appeal.

1. Whether appeal filed by appellant is liable to be accepted as mentioned in memorandum of grounds of appeal.

2. Final order.

**Findings upon point No.1 with reasons:**

9. Complainant filed affidavit Ex.CW-1 in evidence. There is recital in the affidavit that deponent applied for allotment of category-III flat under Partial Self Financing Scheme in Housing Colony at Mandhala (Baddi) in response to the advertisement published by opposite party in newspapers for the allotment of flats. There is further recital in the affidavit that deponent deposited amount of Rs.90000/- (Ninety thousand) vide letter dated 28.07.2007. There is further recital in the affidavit that deponent was declared successful in the draw by opposite party. There is further recital in the affidavit that deponent deposited all installments amounting to Rs.450000/- (Four lac fifty thousand) till 24.12.2009. There is further recital in the affidavit that possession of flat was to be handed over within a period of two years after completion of construction of flat but even after expiry of more than 7 years possession of flat was not handed over to the complainant. There is further recital in the affidavit that on dated 29.06.2015 complainant sent letter to the opposite party for surrendering flat due to inordinate delay in delivering possession of the flat and asked the opposite party to refund whole amount deposited by complainant alongwith interest. There is further recital in the affidavit that opposite party did not refund Rs.450000/- (Four lac fifty thousand) alongwith interest but refunded

Rs.360004/- (Three lac sixty thousand four) vide cheque No. 274894 dated 06.08.2015 and deducted Rs.90366/- (Ninety thousand three hundred sixty six). There is further recital in the affidavit that scheme for allotment of flat was published in the year 2007 and flat was allotted in the year 2008. There is further recital in the affidavit that deduction of earnest money and not paying interest to the deponent is illegal and with malafide intention. State Commission also perused annexures C-1 to C-14 filed by complainant carefully.

**10.** Opposite party did not file any affidavit relating to controversial facts under section 13(4) of Consumer Protection Act 1986. Learned advocate appeared on behalf of opposite party pleaded before learned District Forum that version filed by opposite party be treated as evidence under section 13(4) of Consumer Protection Act 1986 qua controversial facts and annexures OP-1 & OP-2 be read in evidence. State Commission has carefully perused annexures OP-1 and OP-2 filed by opposite party.

**11.** Submission of learned advocate appearing on behalf of opposite party that opposite party did not quote fixed time regarding handing over possession and two years of period for offering possession was tentative in nature and on this ground appeal be allowed is decided accordingly.

Opposite party did not file affidavit as per modes mentioned under section 13(4) of Consumer Protection Act 1986 relating to controversial facts. Learned advocate appearing on behalf of opposite party had given statement before learned District Forum on dated 06.09.2016 that version filed by opposite party be treated as evidence of opposite party under section 13(4) of Consumer Protection Act 1986 relating to controversial facts. It is held that version filed by opposite party could not be treated as evidence relating to controversial facts as per section 13(4) of Consumer Protection Act 1986. There is no provision under section 13(4) of Consumer Protection Act 1986 that version filed by opposite party would be treated as evidence of opposite party. It is held that version of opposite party is only pleadings of opposite party. It is held that pleadings of opposite party and evidence of opposite party under section 13(4) of Consumer Protection Act 1986 qua controversial facts are entirely two different concepts under Consumer Protection act 1986. Hence adverse inference is drawn against opposite party for not filing affidavit as per modes mentioned under section 13(4) of Consumer Protection Act 1986 relating to controversial facts.

**12.** State Commission has also perused annexure OP-2 filed by opposite party dated 25.02.2016 prepared by

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Chief Accounts Officer HIMUDA Shimla-2. There is recital in the affidavit that construction period of flats was three years and possession was required to be offered by June 2011.

Annexure OP-2 is quoted in toto:

**HIMUDA  
NIGAM VIHAR SHIMLA-2**

**Subject: Final Costing of Cat-III Flats in Housing Colony Mandhala Baddi.**

The Costing Committee in its meeting held on 11.02.2016 has finalized cost of 48 Nos. Cat-III in Housing Colony at Mandhala as per details given below:-

<b>Per Unit Cost:-</b>	<b>Plinth Area</b>	<b>Rs. per Sq. M.</b>	<b>Or say</b>
<b>Cat-III Flats</b>	<b>56.00</b>	<b>23,699</b>	<b>1,328,000</b>

The Costing Committee has considered that the construction period of these flats was of 3 years and possession was required to be offered by 6/2011, however completion was delayed. Therefore committee has approved that for allotment made upto year 2011, a rebate in final costs at 10% interest on deposits made by the allottees beyond the period of 3 years shall be allowed upto 12/2015. In view of this final costs of these flats is fixed as detailed under:-

<b>Years of allotment</b>	<b>Cost</b>	<b>Delay Months</b>	<b>Final Cost</b>
2008	1,328,000	54	1,125,500
2009	1,328,000	42	1,170,500
2010	1,328,000	30	1,215,500
2011	1,328,000	18	1,260,500
2012	1,328,000	6	1,317,375
2013	1,328,000	0	1,328,000
2014	1,328,000	0	1,328,000
2015	1,328,000	0	1,328,000

Sd/-

Chief Accounts Officer  
HIMUDA Shimla-2

Administrative Officer  
HIMUDA Shimla-2

**13.** Chief Accounts Officer of HIMUDA Shimla-2 has admitted in written manner that possession of flat was to be delivered by June 2011 to the complainant. But despite receiving entire sale amount from complainant opposite party

did not deliver possession of flat by June 2011. Hence it is held that opposite party could not take benefits of its own wrongs by way of forfeiting earnest money and other administrative charges. It is held that admission on behalf of Chief Accounts Officer that possession of flat was to be given by June 2011 is binding upon opposite party on the concept of vicarious liability. Opposite party could not be allowed to disbelieve letter filed by opposite party before learned District Forum signed by its own employee i.e. Chief Accounts Officer HIMUDA Shimla-2.

**14.** Submission of learned advocate appearing on behalf of opposite party that possession was delayed due to late sanction of electricity and water connections by different departments and on this ground appeal be allowed is decided accordingly. State Commission is of the opinion that opposite party was under legal obligation to receive electricity and water connections from different departments by June 2011. It is held that opposite party could not take benefit of its own laxity. Opposite party did not place on record any legal notice issued by opposite party to electricity and water departments for sanction of electricity and water connections in time bound period. No reason assigned by the opposite party as to why legal notice was not given to the electricity and water

departments for sanction of water and electricity connections within stipulated period.

**15.** Submission of learned advocate appearing on behalf of opposite party that project was a big project consisting of 800 flats of various categories and on this ground appeal be allowed is decided accordingly. State Commission is of the opinion that complainant has applied for the constructed flats and paid the entire consideration amount to the opposite party and as per letter annexure OP-2 filed by opposite party the possession of flat was to be handed over by June 2011 but possession was not handed over to the complainant even after expiry of seven years. It is held that opposite party could not be allowed to deliver possession after seven years of allotment of flat. It is proved on record that complainant waited for seven years for possession and it is held that despite expiry of seven years after the allotment opposite party did not deliver possession of flat to the complainant and committed deficiency in service in a positive manner. See 2007 (1) CPJ 241 NC Narendra K. Sodhi Versus Mohan B. Sawant. See 2002 (2) CPR 57 NC M/s. Lodha Estate Private Limited Versus Urmila Uday Kamath & Ors.

**16.** Submission of learned advocate appearing on behalf of opposite party that opposite party reduced final

costs vide letter annexure OP-2 and on this ground appeal be allowed is decided accordingly. State Commission is of the opinion that reduction of cost of flat by opposite party would not exonerate opposite party from its liability to complete construction work by June 2011. It is held that unilaterally reducing costs of construction is not binding upon complainant. There is no evidence on record in order to prove that complainant has voluntarily agreed to pay the reduced costs finalized by opposite party vide annexure OP-2.

**17.** Submission of learned advocate appearing on behalf of complainant that order passed by learned District Forum is in accordance with law and in accordance with proved facts is decided accordingly. State Commission is of the opinion that learned District Forum has appreciated evidence and annexures in proper manner. It is not expedient in the ends of justice and on the principles of natural justice to interfere in the order passed by learned District Forum. Point No.1 is decided accordingly.

**Point No.2: Final Order**

**18.** In view of findings upon point No.1 above appeal is dismissed and order of learned District Forum dated 22.02.2017 passed in Consumer Complaint No. 02/2016 title Atul Marwaha Versus HIMUDA is affirmed. Letter issued by

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Chief Accounts Officer HIMUDA Shimla-2 annexure OP-2 dated 25.02.2016 will form part and parcel of order. Parties are left to bear their own litigation costs before State Commission. File of learned District Forum alongwith certified copy of order be sent back forthwith and file of State Commission be consigned to record room after due completion forthwith. Certified copy of order be transmitted to parties forthwith free of costs strictly as per rules. Appeal is disposed of. Pending application(s) if any also disposed of.

**Justice P.S. Rana (R)**  
**President**

**Vijay Pal Khachi**  
**Member**

**26.02.2018.**

\*GUPTA\*