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**STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
UTTAR PRADESH, LUCKNOW**

APPEAL NO. 1263 OF 2012

(Against the judgment/order dated 09-05-2012 in Complaint
Case No.406/2011 of the District Consumer Forum-I, Agra)

01. M/s. Nikhil Homes Limited
Through Managing Director
5th Floor, Sri Vrindavan
E/12/8, Sanjay Place
Agra.

02. M/s. Shyamji Infra Developers Pvt. Ltd.
Through Managing Director,
5th Floor, Sri Vrindavan
E/12/8, Sanjay Place
Agra.

...Appellants/Opposite Parties

Vs.

Smt. Neelam Arora
W/o Sri Rakesh Arora
R/o 46/2, Nikhil Uddyan
Shastripuram, Sikandara
Agra

...Respondent/Complainant

BEFORE:

**HON'BLE MR. JUSTICE VIRENDRA SINGH, PRESIDENT
HON'BLE MR. CHANDRA BHAL SRIVASTAVA, MEMBER
HON'BLE MRS. BAL KUMARI, MEMBER**

For the Appellant : Sri Sarvesh Kumar Sharma, Advocate.
For the Respondent : Sri Alok Kumar Singh, Advocate.

Dated : 07-07-2014

JUDGMENT

PER MR. JUSTICE VIRENDRA SINGH, PRESIDENT

The appellants/opposite parties have filed this appeal against the
judgment and order dated 09-05-2012 passed by the District Consumer



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Forum-I, Agra in Complaint Case No. 406/2011 Smt. Neelam Arora the complainant V/s M/s. Nikhil Homes Limited and M/s. Shyamji Infra Developers Pvt. Ltd. the opposite parties, wherein the complaint of the complainant has been allowed and the directions have been issued to the opposite parties to execute the sale deed and deliver the possession of the flat concerned after receiving the balance amount from the complainant with interest @ 12% per annum with effect from 30-09-2011 and if the flat concerned is not available the similar flat in same size, plan and in the same project be made available to the complainant.

Briefly stated the facts in dispute in between the parties remained before the District Consumer Forum are that the complainant has alleged that in the residential scheme constructed by the opposite party Nikhil Majestic Floor, a booking of two rooms apartment was made by the complainant on 17-02-2010. The opposite parties fixed the cost of the flat to the tune of Rs.6,64,000/-. The lease rent was fixed to the tune of Rs.26,500/-. Thus out of the total cost of Rs.7,00,500/-, an amount of Rs.25,000/- was deposited by the complainant towards the booking amount. Flat No.36 situated at ground floor is alleged to have been allotted to the complainant. Subsequently the complainant deposited Rs.55,000/- on 03-03-2010, Rs.90,000/- on 24-12-2010 and another sum of Rs.1,50,000/- on 23-02-2011. A total sum of rs.3,25,000/- is said to have been deposited by the complainant. The complainant was assured that the possession shall be delivered within a period of one year from the date of booking amount. Contrary to this commitment the flats have not been constructed by the opposite parties. The complainant had to deposit the money after taking financial assistance and informed the



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opposite parties that very soon the payment of remaining cost shall be paid after getting loan from the bank. The opposite parties did not give to the complainant the sale letter for obtaining the loan which constitute negligence of the opposite parties. On 25-04-2011 the complainant was informed by the opposite parties that the allotment in her favour has been cancelled on account of default in payment of cost of the flat. As soon as the loan is sanctioned to the complainant, a notice dated 25-06-2011 was sent by the complainant to the opposite parties that the complainant is willing to pay the cost of the flat. Since the opposite parties did not pay any attention towards it, the complainant filed the complaint before the District Consumer Forum.

The opposite parties pleaded before the District Consumer Forum that the cost of the flat was fixed Rs.6,90,000/- and the complainant made the payments as per her own wish and not in time as per plan of the payment. As the plan of payment was construction link plan and timely payment was essence of the contract which was violated by the complainant, therefore, cancellation of the flat vide notice dated 25-04-2011 is just and proper and the complainant has no right, being a defaulter, to file a complaint case. The demand letters dated 03-09-2010, 28-02-2011, 16-03-2011 and notice dated 25-04-2011 were sent to the complainant for the fact that booking of the flat was cancelled and not the allotment of the flat. There was no allotment made in favour of the complainant for which she was only a prospective investor and there was only a booking made in her favour.

After hearing of both the parties the District Consumer Forum-I, Agra allowed the complaint of the complainant as per impugned order



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stated above. Feeling aggrieved by the impugned order, the opposite parties came before this Commission by way of this appeal.

It is contended on behalf of the appellants that during the pendency of this appeal, an amount of Rs.4,01,250/- stood refunded to the complainant which includes interest @ 12% in compliance of the legal notice issued by Mr. Madhukar Pathak, Advocate the learned Counsel of complainant and thus the entire principal money till date has been paid by the opposite parties to the complainant. The complainant on one hand has obtained the entire money with interest and on the other hand is pressing for compliance of the impugned order. An application under Section 27 of the Consumer Protection Act 1986 has also been filed by the complainant against the opposite parties wherein the preliminary objection on behalf of the opposite parties has already been filed. Once the case has been settled outside the court, thereafter the case cannot be proceeded and decided on merits. Neither any flat was allotted to the complainant, nor any agreement has been executed in between the parties. The complainant remained merely a prospective investor having no right to claim possession. Moreover, even the booking of the flat in favour of the complainant has been cancelled by the appellants in default of payment, therefore, there is no case of deficiency in service to the complainant against the opposite parties.

Learned Counsel for the respondent contended that the appellants/opposite parties had not fulfilled its promise to deliver the flat within one year from the date of booking. The delay if any in making payment to the opposite parties by the complainant, was solely caused on account of false assurance given by the employee of the appellants Sri



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Ajai Tiwari who had promised the complainant to secure loan for her flat. The complainant on her own best efforts got the loan from bank and deposited a sum of Rs.1,50,000/- on 23-02-2011 against the flat allotted to the complainant. On different dates a sum of Rs.3,20,000/- against the total amount of flat i.e. Rs.6,90,000/- was deposited by the complainant. The cancellation of allotment of Flat No.36 vide notice dated 25-04-2011 by the opposite parties is malafide and arbitrary for which the District Consumer Forum has rightly held that the complainant had already paid 45% of the flat amount and had also secured loan from the bank and, therefore, the act of the cancellation of the flat is not proper in the given circumstances. The complainant is always ready and willing to pay the balance amount and is entitled to get the impugned order executed against which this appeal deserves to be dismissed.

After hearing of both the parties as aforesaid and in the light of the entire facts and circumstances on record we have found that the complainant had sent a legal notice dated 06-12-2012 through Sri Madhukar Pathak, Civil Court, Agra to the opposite parties to get the money of the complainant to be refunded to the complainant for the purchase of a house from some other colonizer and Cheque No. 337093 dated 11-12-2012 of Andhra Bank, Branch Sadar, Agra in favour of Neelam Arora the complainant for an amount of Rs.4,01,250/- including the principal amount and interest amount @ 12% per annum has been paid by the opposite party to the complainant through her account with Andhra Bank, Agra as per statement of account dated 18-12-2012 is on record. There is no denial of this subsequent development of the facts in between the parties after filing this appeal. In such circumstances, we



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have arrived at this conclusion that there seems no dispute remains in between the parties.

So far as the question of merit of this appeal is concerned, there is an admitted fact that there had been default in payments made by the complainant to the opposite parties. In this respect whatever may be the reason pertaining to the controversy that the loan could not be arranged due to default of the opposite parties in issuing the sale letter for the loan purpose, the fact remains that the payments have not been made as per plan of the payment agreed in between the parties. In such circumstances, the complainant cannot be assisted for the relief that the cancellation of the allotment or the booking (which is in controversy), could have not been done by the opposite parties. In the case of Manpreet Kaur V/s Meerut Development Authority and another II(2010) CPJ 269(NC), the Hon'ble National Commission laid down the principle of law that the payment of instalment cannot be with-held on account of the non development of the Sector. In the case of Prashant Kumar Shahi V/s Ghaziabad Development Authority, reported in (2000) SCC page 120, the Hon'ble Apex Court has held that any person having failed to perform his part of the contract, the appellant cannot be permitted to urge that he is not liable to pay balance amount alongwith interest and the other party is not expected to deliver possession in the absence of the payment of the agreed amount. In such circumstances the booking/allotment cancelled by the opposite parties in this case cannot be held illegal.

So far as the question of this fact is concerned that complainant is not entitled to invoke the door of the Consumer Fora being the prospective allottee and merely an investor as is submitted by the learned



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Counsel for the appellants in this case, we have gone through the letters of correspondence in between the parties. Though it is submitted on behalf of the appellants that there had been merely a booking of the flat in favour of the complainant/respondent but since the correspondence made by the appellants with the complainant stating therein that payment towards Flat No. 36/1 (Ground Floor) is due and the balance amount has to be made by the complainant, it cannot be said that there had been merely a booking for a flat. Had there been the position of merely booking a flat and the flat had to be allotted later on, the number of the flat would have not been mentioned in the correspondence made by the opposite parties with the complainant. Mentioning the number of flat clearly shows that a particular flat numbered 36/1 (Ground Floor) was secured/allotted/booked in the name of the complainant. In such cases wherein merely the booking is used to be made for the flats, the number of a particular flat is never used to be mentioned for the particular person booking the flat and after construction and completion of the flats the persons who had booked the flats, used to be allotted later on thereby mentioning the number of a particular flat alleged to have been allotted in the name of the person concerned. Here in this case before us since the particular number of flat is mentioned stating the sort of booking shall amount the allotment as there is no other formality seems to have been pending for allotment to the complainant for a particular flat instead of flat number mentioned in the alleged booking and alleged correspondence demanding the balance amount against that flat. Hence it cannot be said that the complainant had been merely a prospective investor and not the allottee. Therefore, the argument of the appellants in




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this regard that the complainant cannot invoke the doors of the Consumer
Fora is not tenable.


In the light of the entire facts and circumstances on record we are
of this view that since the amount has already been refunded by the
opposite parties to the complainant with interest and since there is no
illegality or irregularity have been found by us in the cancellation of the
flat alleged, we are of this view that this appeal deserves to be allowed
and the complaint filed by the complainant before the District Consumer
Forum does also deserves to be dismissed accordingly.

ORDER

The aforesaid appeal is hereby allowed. The impugned order dated
09-05-2012 is hereby set aside and the complaint filed by the
complainant before the District Consumer Forum is hereby dismissed.
Both parties have to bear their own costs.


7-7-14
(JUSTICE VIRENDRA SINGH)
PRESIDENT


(CHANDRA BHAL SRIVASTAVA)
MEMBER


(SMT. BAL KUMARI)
MEMBER

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