West Bengal Real Estate Regulatory Authority
Calcutta Greens Commercial Complex (1st Floor)
1050/2, Survey Park, Kolkata- 700 075

Complaint No.WBRERA/COM(PHYSICAL) 000138

Somnath Deb & Babita Rani Deb..... Complainants

Vs

Unimark Realty Private Ltd..... Respondent No.1

LIC Housing Finance Limited..... Respondent No.2

Sl. Number and date of order	Order and signature of the Authority	Note of action taken on order
01 13.08.2024	Complainant (Mobile- 6291213556 & Email Id - somnathdeb81@gmail.com)s is present in the physical hearing and signed the Attendance Sheet. Authorized Representative of the Respondent no.1, Mr. Gopal Jhunjhunwala (Mobile – 983609955, 8335820900 and email Id – gopal@unimarkgroup.com, kumar@unimarkgroup.com) is present in the physical hearing on behalf of the Respondent filing Authorization and signed the Attendance Sheet. Heard both the parties in detail. As per the Complainant, the fact of the case is that,- An Agreement was executed on 31.08.2012 between the Complainant-Landowner and the Respondent no.1-Promoter for Development and Allotment of a residential unit in the project named **'Unimark Sports City at Barasat'** in lieu of the land of the Complainant thereat. It was agreed upon that a residential unit in the said project to be handed over to the Complainant within 11 (eleven) years from the date of the execution of the above said Agreement. If they fail to do so within the stipulated period, they will compensate the Complainant at the rate of Rs.5,000/- per month per cottah. Already more than 11 years elapsed, neither they have completed the project nor handed over the unit to the Complainant. **The Complainant prays before the Authority for the following reliefs:-** As per Agreement the Respondent no.1 is legally bound to handover a residential unit within stipulated time period of 11 years from the date of Agreement but they failed to comply with the terms and conditions enumerated in the said Agreement. The Complainant urge for immediate completion of the	

project and handover of the possession of the unit as agreed upon. Otherwise, the Respondent no.1 may settle with the Complainant by paying the present market value of the residential unit.

The Complainant stated at the time of hearing that he was shocked and surprised to note from the contents of **public notice dated 21.03.2024** (hereinafter referred to as the 'said notice') issued by LIC Housing Finance Limited (hereinafter referred to as 'LIC HFL'), allegedly in exercise of its power under section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter after referred to as the 'SARFAESI Act') read with Rule 8 of the SARFAESI Rules in respect to the subject matter project. The Complainant from the contents of the said notice for the first time came to know that the Respondent No. 1 had mortgaged the said project named **'Unimark Sports City at Barasat'** with the LIC HFL.

Copy of the said public notice issued by the LIC HFL is annexed with the Complaint Petition.

Complainant stated that, in the said notice dated 21.03.2024, the LIC HFL has stated that they have taken possession of the subject matter project and the Mortgagor / Loanee and the public at large have been notified by the said notice not to take any action in respect of the said project.

The Complainant at the time of hearing requested for necessary direction / order for stay of all the proceedings taken / to be taken by the LIC HFL.

The Respondent no.1 stated at the time of hearing that LIC HFL has taken action in accordance with section 13(4) of the SARFAESI Act and they are trying their best to resolve the matter with LIC HFL.

The said section 13(4) of the SARFAESI Act provides that,-

"section 13(4).- In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;".

Before admitting this matter, first it has to be considered whether this Complaint Petition can be admitted for hearing under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'RERA Act').

Section 31 provides that,-

"section 31. **Filing of complaints with the Authority or the adjudicating officer.**—(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the Rules and Regulations made there under,

against any promoter, allottee or real estate agent, as the case may be.

Explanation:—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed.".

Therefore, the **first question** to be determined is whether the present Complainant is an Allottee or not.

This question has been already adjudicated by Hon'ble West Bengal Real Estate Appellate Tribunal (in short WBREAT) in Appeal No.WBREAT/Appeal No.-011/2023 in the matter of Amarnath Banerjee Vs Rajib Halder and Ors. by an order dated 05.03.2024. In the said order the Hon'ble Tribunal held that the landlord who provides his land to a Developer by virtue of a Development Agreement to develop his land and in lieu of that land he has been allotted / provided flat / unit by the said Developer, also comes under the purview of the definition of Allottee as per section 2(d) of the RERA Act.

Section 2(d) provides that,-

"Section 2(d). "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;".

Here the Complainant is entitled to acquire a residential unit by virtue of the Development Agreement dated 31.03.2012 signed between him and the Respondent no.1, therefore, in terms of section 2(d) of the RERA Act, the present Complainant is an allottee and he has the locus standi to file this Complaint against the Promoter Unimark Realty Private Limited.

The **second question** is that whether LIC HFL can be considered as Promoter or not. In this respect a Judgment of High Court of Judicature for Rajasthan Bench at Jaipur may be taken into consideration.

As per the said Judgment of High Court of Judicature for Rajasthan Bench at Jaipur in the matter of D.B. Civil Writ Petition No. 13688/2021 and other connected matters, the Hon'ble High Court has been pleased to observe that, -

"28. The last question surviving for our consideration is, does RERA have the authority to issue any directions against a bank or financial institution which claims security interest over the properties which are subject matter of agreement between the allottee and the developers. The term "allottee" has been defined under Section 2(d) of the RERA Act as to mean in relation to real estate project the person to whom a plot, apartment or building has been allotted, sold or otherwise transferred by the promoter and would include a person who subsequently acquires the said allotment through sale, transfer or otherwise

but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent. The term "promoter" is defined in Section 2(zk) as under:-

"2(zk) "promoter" means,—

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of—

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made there under;

29. The term "real estate agent" has been defined in Section 2(zm) as to mean any person who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building in a real estate project by way of sale with another person and who receives remuneration or charge for the services so rendered. Under sub-section (1) of Section 31, any aggrieved person may file a complaint before RERA or before the adjudicating officer for any violation or contravention of the provisions of the Act or the rules and regulations against any promoter, allottee or real estate agent, as the case may

be. The complaint by an aggrieved person thus would be restricted to being filed against any promoter, allottee or real estate agent. It is in this context the definition of term "promoter" and its interpretation assumes significance. We have reproduced the entire definition of the term "promoter". Perusal of this provision would show that the same is worded "as to mean" and therefore prima facie is to be seen as restrictive in nature. However various clauses of Section 2(zk) would indicate the desire of the legislature to define this term in an expansive manner. As per Clause (i) of Section 2(zk) "promoter" means a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees. By couching this clause in "means and includes" language the definition of a term "promoter" is extended by including within its fold not only a person who constructs or causes construction of independent building but also his assignees.

30. The term "assignee" has not been defined anywhere in the Act. We would therefore have to interpret the term as it is ordinarily understood in the legal parlance in the context of the provisions of RERA Act. The Advance Law Lexicon by P. Ramanatha Aiyar expands the term "assignee" as to grant, to convey, to make an assignment; to transfer or make over to another the right one has in any object as in an estate. It further provides that an assignment by act of parties may be an assignment either of rights or of liabilities under a contract or as it is sometimes expressed an assignment of benefit or the burden of the contract. The rights and liabilities of either party to a contract may in certain circumstances be assigned by operation of law, for example when a party dies or becomes bankrupt.".

Therefore, from the above observations of the Hon'ble High Court and from the definition of "Promoter" as provided in section 2(zk) of the RERA Act, the Authority is of the considered opinion that **LIC HFL is a Promoter** in the present matter for the following reasons:-

The definition of Promoter as provided in section 2(zk) of the RERA Act provides that Promoter means and includes his assignees also and LIC HFL can be considered as an Assignee as in this case the Promoter Unimark Realty Private Limited has assigned its right, title and interest to the LIC HFL by mortgaging the subject matter project with the said Financial Institution. Therefore, it is crystal clear that LIC HFL is an assignee of the Unimark Realty Private Limited and therefore it is also a Promoter as per the definition of Promoter in the RERA Act in the present case.

The **third question** to be determined is that whether the subject matter project comes within the purview of the RERA Act.

It is to be mentioned here that the Hon'ble Supreme Court of India in Civil Appellate Jurisdiction in Civil Appeal No(s). 6745 - 6749 of 2021 (Arising out of SLP (Civil) No(s). 3711-3715 of 2021) in the matter of M/s. Newtech Promoters And Developers Pvt. Ltd.....Appellant(s) Vs State of UP & Ors. etc.....Respondent(s) dated 11.11.2021 has been pleased to held that,-

"Looking to the scheme of Act 2016 and Section 3 in particular of which a detailed discussion has been made, all 'ongoing projects' that

commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception the inter se rights of the stake holders, including allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority.".

From the above observations of Hon'ble Supreme Court of India, the subject matter project and this Complaint matter come within the purview of the provisions of the RERA Act, as per the provision of section 3 of the RERA Act, because the project not yet completed and Completion Certificate of the project has not yet been issued till date.

Therefore, after hearing all the parties and after taking into consideration the documents placed on record, the Authority is pleased to admit this matter for further hearing and order as per the provisions contained in Section 31 of the Real Estate (Regulation and Development) Act, 2016 read with Rule 36 of the West Bengal Real Estate (Regulation and Development) Rules, 2021.

Now, to take a decision regarding the stay order(s) prayed by the Complainant at the time of hearing today, the Authority has to consider some points which are as follows:-

The **first thing to be considered** by the Authority that action has been taken by the LIC HFL as per the provisions of SARFAESI Act specifically section 13(4) of the said Act. Whether RERA Act will prevail over the provisions of SARFAESI Act is to be considered.

In this regard section 89 of the RERA Act is surely to be taken into consideration which provides that,-

"Section 89. Act to have overriding effect.- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.".

Therefore section 89 of the RERA Act clearly and unequivocally provides that RERA Act shall override and prevail over any other law for the time being in force and from which it can be concluded that RERA Act shall prevail over the provisions of the SARFAESI Act, whenever there is a contradiction between the provisions of the said two Acts.

In this regard the Judgment of the Supreme Court of India in Petition for Special Leave to Appeal (C) Nos. 1861-1871/2022 in the matter of Union Bank of India Vs Rajasthan Real Estate Regulatory Authority & Ors. also should be taken into consideration. The Apex Court in the said matter has been pleased to direct that,-

"36. Our conclusions can thus be summarized as under:-

(i).....

(ii).....

(iii) As held by the Supreme Court in the case of Bikram Chatterji (Supra) in the event of conflict between RERA Act and SARFAESI Act the provisions contained in RERA would prevail

(iv).....

(v) RERA authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as a secured creditor if the Bank takes recourse to any of the provisions contained in section 13(4) of the SARFAESI Act.

However, is it clarified that para 36(v) reproduced hereinabove shall be applicable in a case where proceedings before the RERA Authority are initiated by the Home Buyers to protect their rights. With this, the Special Writ Petition are dismissed.".

With the above observation of Hon'ble Supreme Court of India it can be clearly stated that the provisions of RERA Act shall prevail over the provisions of the SARFAESI Act whenever there is a contradiction between the two Acts and therefore, the WBRERA Authority has every power and jurisdiction to admit the present Complaint and heard the matter as per the provisions of RERA Act and pass orders including stay orders as per the provisions of the RERA Act.

The **second thing to be considered** whether a stay order is actually required or not in the present matter.

In this regard it is to be considered that the RERA Act is a later / subsequent Act and it is a Special Act to protect the right, title and interest of the Allottees / Home Buyers. Although the LIC HFL has taken action as per the provisions of section 13(4) of the SARFAESI Act but this action of the Financial Institution clearly violated and hampered the right of the Complainant. The Complainant herein is the bonafide Landowner cum Allottee who has agreed to provide his land to get it developed by the Respondent No.1- Promoter /Developer and get a residential unit in lieu of his Land. To protect the interest, right of the Complainant, a stay order is very much required to be imposed regarding the actions taken by the LIC HFL.

In this regard section 11(4)(g) and 11(4)(h) of the RERA Act should be taken into consideration which provides that, -

"section 11(4). The Promoter shall –

(a) .....

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(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings

(including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

section 11(4)(h).- after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be.".

Therefore being the Promoters of this project, the Unimark Realty Private Limited and the LIC Housing Finance Limited are both under the obligation to deliver the residential unit to the Complainant free of any charge, mortgage etc. as per the provisions contained in section 11(4)(g) and 11(4)(h) of the RERA Act, as mentioned above. Both the Promoters have failed in their obligations. The Complainant has no fault in his part therefore his right, interest cannot be hampered / infringed by operation of the SARFAESI Act. Hence, an interim order of stay should be imposed upon the LIC Housing Finance Limited until the disposal of this matter or until further order of this Authority, whichever is earlier.

This Authority has the power to issue interim orders including stay order in exercise of the provision contained in section 36 of the RERA Act. Section 36 of the RERA Act provides that,-

"**section 36. Power to issue interim orders.**—Where during an inquiry, the Authority is satisfied that an act in contravention of this Act, or the rules and regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority may, by order, restrain any promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where the Authority deems it necessary.".

Therefore, after hearing both the parties in the physical hearing today and careful consideration the Complaint Petition and documents annexed with the said Petition, the Authority is pleased to give the following directions:-

a) Let **LIC Housing Finance Limited (in short LIC HFL)** be included as **Respondent no.2** in the present matter, as it is a necessary party for adjudication of this matter, and **Unimark Realty Private**

Limited be hereinafter referred to as **Respondent no.1** in the present matter; and

b) An interim order of **stay** is hereby imposed restraining the Respondents and their men, agents and officers from infringing / violating the right, title and interest of the Complainant in the subject matter project named **'Unimark Sports City at Barasat'**, during the pendency of the instant proceeding or until further order, whichever is earlier.

c) An interim order of **stay** restraining the Respondents from transferring and / or alienating and / or selling the project or any part of it to any third party, during the pendency of the instant proceeding or until further order, whichever is earlier.

d) The Complainants are hereby directed to submit their total submission regarding his Complaint Petition on a Notarized Affidavit annexing therewith notary attested/self-attested copy of supporting documents and a signed copy of the Complaint Petition and send the Affidavit (in original) to the Authority, serving a copy of the same to the Respondent, both in hard and scan copies, within **15 (fifteen)** days from the date of receipt of this order through email.

e) The Respondents are hereby directed to submit his Written Response on notarized affidavit regarding the Complaint Petition and Affidavit of the Complainants, annexing therewith notary attested copy of supporting documents, if any, and send the Affidavit (in original) to the Authority serving a copy of the same to the Complainants, both in hard and scan copies, within **15 (fifteen)** days from the date of receipt of the Affidavit of the Complainants either by post or by email, whichever is earlier.

Fix **12.12.2024** for further hearing and order.

(TAPAS MUKHOPADHYAY)
Member
West Bengal Real Estate Regulatory Authority