

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

Complaint No. WBRERA/COM000909

Sanon Sen & Associates Pvt. Ltd..... Complainant

Vs

Ideal Real Estates Pvt. Ltd..... Respondent No. 1

Yes Bank Limited..... Respondent No. 2

Sl. Number and date of order	Order and signature of the Authority	Note of action taken on order
01 <u>07.06.2024</u>	<p>Advocate Abhishek Roy (Mob. No. 7687877080 & email Id: abhishek@samyakkattorneys.com) and Advocate Soumyadeb Sinha is present in the physical hearing today on behalf of the Complainant, filing vakalatnama and signed the Attendance Sheet.</p> <p>Advocate Mobina Ali (Mob. No. 9007316444 & email Id: mobina@legaloptions.in) is present in the physical hearing today on behalf of the Respondent No. 1, filing vakalatnama and signed the Attendance Sheet.</p> <p>Advocate Mr. Sourjya Roy (Mob. No. 9836486947 & email Id: srjroy8@gmail.com) is present in the physical hearing today on behalf of the Respondent No.2, filling vakalatnama and signed the Attendance Sheet.</p> <p>Heard all the parties in detail.</p> <p>The Complainant has submitted an Application for Addition of Party and prayed for addition of Yes Bank Limited as Respondent no.2 for proper adjudication of this matter. As per the Complainant Yes Bank Limited is a necessary party in this matter and the Complainant prayed before the Authority for reliefs against the actions taken by the said bank. He stated that, at the time of filing online complaint they have not been able to find the option to add another Respondent therefore he could not include the Yes Bank Limited as Respondent no.2. Hence, he prayed for inclusion of Yes Bank Limited as Respondent No.2 in this matter. The said Application has been received by the office of the Authority on 04.06.2024.</p> <p>Let the said Application for Addition of Party submitted by the Complainant be taken on record.</p> <p>Considered and granted the prayer of the Complainant regarding inclusion of Yes Bank Limited as a Respondent.</p>	

Let **'Yes Bank Limited'** be hereby included as **Respondent no.2** and **Ideal Real Estates Pvt. Ltd.** be henceforth referred to as **Respondent no.1**.

As per the Complaint Petition,-

1. The Complainant is the allottee/intending purchaser of the flat being no. 3B (4BHK) in Block - C having super built up area having 3305 sq.ft. along with one open car parking spaces and two basement upper car parking spaces at the residential project namely **'Ideal Exotica'** of the Respondent No.1 situated at 21 Pramatha Chaudhury Sarani, New Alipore, Kolkata-700 053.
2. Being allured by representations and publications of Ideal Real Estates Pvt. Ltd. (Developer) that is Respondent no.1 in relation to its said residential project, the undersigned had approached the said Developer and upon discussion and negotiation, it was agreed that the said Developer would sell the said flat at a total sale consideration of Rs.3,04,74,982/-.
3. Upon such understanding, the undersigned had issued a cheque/draft of Rs.19,80,000/-to the Respondent no.1 and upon receipt of such cheque/draft, the Respondent no.1 had issued the Allotment letter dated 14.02.2021 in respect of the said flat.
4. Subsequent thereto in furtherance of such Allotment, the Complainant has made further payments and till date a sum of Rs.40,00,000/-has been paid to the Respondent no.1 towards the agreed sale consideration and the Respondent no.1 has issued money receipts acknowledging such payment. Therefore, as on date only a sum of Rs.2,64,74,982/- is due and payable.
5. Therefore, the Complainant has always been ready and willing to purchase the flat for valuable consideration and in the meantime a substantial amount of money has been paid for such purpose.
6. It is pertinent to mention here that the Complainant is in physical possession of the said flat and his name has been recorded in the records of Kolkata Municipal Corporation as the "recorded owner/person liable to pay tax" in respect of the said flat. However, the said flat is not the residence of the Complainant.
7. At this juncture, suddenly, pursuant to a letter dated 12.04.2024 issued by Respondent no.2, the Complainant came to know that the Respondent no.1 has defaulted in payment of its loan to the Respondent no.2. By the said letter the Respondent no.2 invited representations of the home buyers / allottees along with relevant documents.

8. Under the circumstances, on being asked to make such representation of his claim before the Respondent no.2, vide letter dated 26.04.2024, the Complainant had filed his representation before the Bank along with all relevant documents. Further to his representation, he had requested the Respondent no.2 to accept the balance consideration and cause to execute deed of conveyance in his favour.
9. Without responding to his letter, suddenly on 24.05.2024 the said bank that is Respondent no.2 cause to issue a publication in the newspaper for E-auction of his said flat on 28.06.2024 and invited interested parties to inspect the property in the meantime.
10. The Complainant has also in the meantime ascertained that the Respondent no.2 had caused to issue another purported notice in the newspaper on 22.03.2024 in respect of the said flat.
11. However, such blatant denial and / or refusal on the part of the bank to recognize his right and interest in respect of the said flat and such publication for E-auction of the said flat is illegal and bad in law. The Complainant having already been allotted the said flat, being in possession, thereof, having paid a sum of Rs.40,00,000/- already and being ready and willing to pay the balance consideration in easy installments, the act of the bank that is Respondent no.2 putting the property for e-auction without considering his case in absolutely misconceived and the said bank is required to be restrained from disposing of the property in E-auction and / or from creating any further third party interest in respect of the said flat as the same shall be detrimental to his interest. Admittedly he has a prior interest in the said flat and a prior right to purchase the said flat which cannot be denied by the bank and the bank is required to be directed in such terms to accept the balance consideration and execute and registered the said flat in his favour.
12. The Complainant has ascertained in the meantime that the Hon'ble Supreme Court of India and various High Courts of the country have time and again held that on the default of the promoters/developer, the interest of the allottees or home buyers in respect of a project, who have paid substantial amount of consideration, is to be safeguarded regardless of any proceedings that may be initiated by the bank

under the IBC or SARFAESI Act.

The Complainant prays before the Authority for the following relief(s):-

- a. The Respondent no.1 and 2 be directed to execute and register and/or cause to execute and register the Deed of Conveyance in respect of the flat being no. 3B (4BHK) in Block - 'C' having super built up area having 3305 sq. ft. along with one open car parking and two basement upper car parking spaces at the residential project namely "Ideal Exotica" situated at 21, Pramatha Chaudhury Sarani, new Alipore, Kol-700 053 upon receiving the balance consideration.
- b. The Respondent no.2 may be directed to accept the balance consideration of Rs.2,64,74,982/-in easy installments.
- c. An interim or temporary order restraining the Respondent no.2 from giving effect to and /or acting upon the notice dated 24.05.2024 of E-Auction in respect of the said flat and/or from issuing any other notice of E-Auction and / or from disposing of the said property in E-Auction on 28.06.2024 or on any date thereafter and /or by any other means and / or from creating any third party interest in respect of the said flat being No. 3B (4BHK) in Block-'C' having super built up area having 3305 sq. ft. along with one open car parking and two basement upper car parking spaces at the residential project namely "Ideal Exotica" situated at 21, Pramatha Chaudhury Sarani, new Alipore, Kol-700 053 till pendency of the instant proceeding.
- d. Alternatively, an order be passed directing the Respondent no.2 and/or the Respondent no.1 to refund the sum of Rs.40,00,000/- along with interest at the rate of 18% per annum from the date of receipt till the date of recovery.
- e. Such other order and orders as he may be entitled to under law.

The Complainant stated at the time of hearing that he is in the peaceful possession of the subject matter flat that is flat no. 3B in Block - C of the subject matter project, and he is ready and willing to pay the balance consideration of Rs.2,64,74,982/- of the said flat in easy installments. He prayed for necessary direction for stay of all the proceedings taken by the

Respondent Bank.

The Complainant also requested the Authority to give necessary direction so that Respondent no.2 accepts the balance consideration of the said flat and register and / or cause to execute and register the Deed of Conveyance in respect of the flat in favour of the Complainant.

The Advocate of the Respondent no.2 stated that they have no objection to accept the balance amount from the Complainant and thereafter execution and registration of the Deed of Conveyance in favour of the Complainant, if the Respondent no.1 gives consent in this regard.

The Advocate of the Respondent no.2 also stated that the Bank deals with public money and the property is a mortgaged property. The subject matter flat has been mortgaged with the Yes Bank Limited by the Ideal Real Estates Private Limited. The Respondent has taken action as per law in accordance with section 13(4) of the SARFAESI Act. The said section 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;”.

He also stated that section 17 of the SARFAESI Act provides that, -

“section 17.- Application against measures to recover secured debts.- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:”.

The Respondent no.2 stated that, any person including the present Complainant can take recourse of section 17 of the SARFAESI Act, if he is aggrieved with any action taken by the bank against the said person in exercise of the provisions contained in section 13(4) of the SARFAESI Act.

He also stated that the submission of the Promoter Ideal Real Estates

Private Limited required to be taken in this matter for proper adjudication.

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 question is whether Yes Bank Limited can be considered as Promoter or not. In this respect a Judgment of High Court of Judicature of Rajasthan Bench at Jaipur can 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, colonizer, 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 thereunder;”

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 'Yes Bank Limited' 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 Yes Bank Limited can be considered as an assignee as in this case the Promoter Ideal Real Estates Private Limited has assigned its right, title and interest to the Yes Bank Limited by mortgaging the subject matter flat with the said Bank. Therefore, it is crystal clear that Yes Bank Limited is an assignee of the Ideal Real Estate Private Limited and therefore it is also a Promoter in the present case, as per the definition of Promoter in the RERA Act.

Therefore, after hearing both 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 interim orders and the stay orders prayed by the Complainant 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 Yes Bank Limited 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, it is 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 question 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 Yes Bank Limited has taken action as per the provisions of section 13(4) of the SARFAESI Act but this action of the Bank clearly violated and hampered the right of the Complainant who is in the peaceful possession of the subject matter flat.

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 Ideal Real Estate Private Limited and the Yes Bank Limited are both under the obligation to deliver the flat 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 rightful peaceful possession from the said flat cannot be ousted by operation of the SARFAESI Act. Therefore an

interim order of stay should be imposed upon the Respondent no.2 that is the Yes Bank 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 and after taken into consideration the Complaint Petition, this Authority is pleased to give the following directions:-

- a) An interim order of **stay** is hereby imposed upon the Respondent no.2 that is upon the **Yes Bank Limited** restraining the Respondent no.2 from giving effect to and /or acting upon the notice dated 24.05.2024 of E-Auction in respect of the said flat no. 3B (4BHK) in Block - 'C' in the subject matter project and/or from issuing any other notice of E-Auction and / or from disposing of the said property in E-Auction on 28.06.2024 or on any date thereafter and /or by any other means and / or from creating any third party interest in respect of the said flat being No. 3B (4BHK) in Block-'C' having super built up area of 3305 sq. ft. (approx.) along with one open car parking and two basement upper car parking spaces at the residential project namely "Ideal Exotica" situated at 21, Pramatha Chaudhury Sarani, new Alipore, Kol-700 053 till pendency of the instant proceeding or until further order, whichever is earlier.
- b) The Complainant is directed to submit his total submission regarding his Complaint Petition on a Notarized Affidavit annexing therewith notary attested/self-attested of supporting documents and a signed copy of the Complaint Petition and send the original Affidavit to the Authority, serving a copy of the same to the Respondent, both in hard and soft copies, within **15 (fifteen)** days

from the date of receipt of this order through email.

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

Fix **07.08.2024** for further hearing and order.


(BHOLANATH DAS)

Member

West Bengal Real Estate Regulatory Authority


(TAPAS MUKHOPADHYAY)

Member

West Bengal Real Estate Regulatory Authority