

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

Complaint No.COM 000198 (erstwhile WBHIRA)

Dinesh Chandra Agarwal ..... Complainant

Vs

Tapajyoti Khan..... Respondent no.1

Dilip Saha.....Respondent no.2

Samir Kumar Dey..... Respondent no.3

Rita Dey..... Respondent no.4

Suranjana Dey..... Respondent no.5

Sanjoy Kumar Dey..... Respondent no.6

Seema Kundu..... Respondent no.7

Sl. Number and date of order	Order and signature of Authority	Note of action taken on order
04 19.03.2024	<p>The matter was previously heard on 25.02.2020, 27.07.2023 and 09.11.2023 and today the matter has been taken up for final hearing after due service of hearing notices to all the parties.</p> <p>Complainant Dinesh Chandra Agarwal (Mobile 9836689055, email – <a href="mailto:dinesh27110@yahoo.com">dinesh27110@yahoo.com</a> ) is present in the physical hearing today and signed the Attendance Sheet.</p> <p>Respondent No. 7 Smt. Seema Kundu ( Mobile No. 9830969603) is present and signed the Attendance Sheet.</p> <p>Ld. Advocate Smt. Gouri Biswas (Mobile No. 9434620405 ) is present in the physical hearing today on behalf of Respondent No. 6 and 7, she submitted Vakalatnama and signed the Attendance Sheet.</p> <p>Let the said Vakalatnama and Attendance Sheet be kept on record.</p> <p>The Authority has sent notices for hearing today that is on 19.03.2024 to all the Parties and Postal track reports are already in the case records.</p> <p>Complainant has submitted before this Authority some</p>	

Additional Documents on **Supplementary Notarized Affidavit** affirmed on 30.01.2024.

Let the said Supplementary Notarized Affidavit dated 30.01.2024 submitted by the Complainant be taken on record.

Complainant has also submitted a **Rejoinder** on Notarized Affidavit dated 06.03.2024, as per the last order of the Authority dated 09.11.2023, which has been received by this Authority on 13.03.2024.

Let the said Rejoinder dated 06.03.2024 submitted by the Complainant be taken of record.

Complainant has also submitted an **Notarized Affidavit of Service** dated 13.03.2024 before this Authority, stating that copy of his Supplementary Affidavit dated 30.01.2024 and Rejoinder dated 06.03.2024 have been duly served to all the Respondents and they have received the same either by post or by electronic mode of communications, which has been received by this Authority on 13.03.2024.

Let the said Affidavit of Service dated 13.03.2024 submitted by the Complainant be taken on record.

Complainant has further submitted a Notarized Affidavit affirmed on 14.03.2024, containing an **Application for Substitution** of the legal heirs and successors, namely (a) Smt. Sima Dey (widow) and (b) Shri Sourav Dey (son), both residing at 35/1B, Khudiram Bose Sarani, P.S.- Tala, Kolkata-700037, of the Respondent no. 3 Late Samir Kumar Dey, which has been received by the Authority on 14.03.2024.

Let the said Application for Substitution of the legal heirs and successors of Respondent No.3, Late Samir Kumar Dey, be taken on record.

Complainant has also submitted another **Notarized Affidavit of Service** affirmed on 18.03.2024, today at the time of hearing before the Authority, stating that copy of Application for Substitution of said legal heirs and successors of Respondent no.3, since deceased, have been duly served to all the Respondents and also to the Ld. Advocate Shri Abhishek Shaw representing the deceased Respondent No.3, in his email id [abhishekshaw10@gmail.com](mailto:abhishekshaw10@gmail.com) and copies of the said Application have duly been received by the legal heirs and successors of erstwhile Respondent No.3 and other Respondents have received the same either by post or by electronic mode of communications.

Let the said Notarized Affidavit of service dated 18.03.2024 be taken on record.

Despite due service of copies of the said application, none of the legal heirs and successors of Respondent No.3 appeared before this Authority either in person or through pleader today.

Ld. Advocate Smt. Gouri Biswas submitted today at the time of hearing before the Authority a Notarized Affidavit- in- Opposition dated 09.02.2024 affirmed by the Respondent No.6 Sri Sanjoy Kumar Dey, praying that he should be released from any sort of liabilities in connection with this Complaint Case on the plea taken in the said Affidavit.

Let the said Affidavit- in - Opposition on behalf of Respondent No. 6 be taken on record.

Ld. Advocate Smt. Gouri Biswas also submitted today at the time of hearing before the Authority a Notarized Affidavit dated 28.02.2024 affirmed by the Respondent No.7 Smt. Seema Kundu, praying that she should be released from any sort of liabilities in connection with this Complaint Case on the plea taken in the said Affidavit.

Let the said Affidavit on behalf of Respondent No. 7 be taken on record.

Respondent No. 1 Shri Tapajyoti Khan, legal heir and successor of the erstwhile Developer, Late Mahamaya Khan, earlier Respondent No.1 of this Case, has submitted an Affidavit- on -Oath with Notarial Certificate dated 16.02.2024, as per direction (d) of the last order of the Authority dated 09.11.2023, which has been received by this Authority on 19.02.2024, but he has not appeared before this Authority either in person or through pleader today or on earlier dates of hearing.

Let the said Affidavit of Respondent no.1 dated 16.02.2024 be taken on record.

During his lifetime, the Respondent no.3 Samir Kumar Dey, since deceased, filed his Written Response on Affidavit dated 09.02.2024, before this Authority, sent through his Ld. Advocate Shri Abhishek Shaw by his email id ( [abhishekshaw10@gmail.com](mailto:abhishekshaw10@gmail.com) ), serving copy of the same to the Complainant and Respondent No.1 through email on 12.02.2024 .

During his lifetime, the Respondent no.3 Samir Kumar Dey, since deceased, filed another Written Response on Affidavit dated 09.02.2024, before this Authority, sent through his Ld. Advocate Shri Abhishek Shaw by his email id ( [abhishekshaw10@gmail.com](mailto:abhishekshaw10@gmail.com)), serving copy of the same to the Complainant and Respondent No.1, as per direction (d) of the last order of the Authority dated 09.11.2023 through email on 12.02.2024 .

Let the said two Affidavits of the Respondent No.3 be taken on record.

The **Application for Substitution** of Smt. Sima Dey ( widow of Late Samir Kumar Dey) and Shri Sourav Dey ( son of Late Samir Kumar Dey) in place of Late Samir Kumar Dey, since deceased, erstwhile Respondent No.3, is hereby allowed and their names be recorded in the case records being Smt. Sima Dey as **Respondent no.3A** and Shri Sourav Dey as **Respondent no.3B**.

Heard, submissions by all the parties Present before this Authority at the time of hearing today and carefully examined all the Affidavits and record filed by the Complainant and Respondents.

The case of the Complainant is that Complainant entered into a Registered and Notarized Agreement for Sale executed between Mahamaya Khan, since deceased, (erstwhile Developer) and Shri Dilip Saha the power holder and Assignor as described in Development Agreement in respect of the flat No.1D in the First Floor at the premises no. 35B, Khudiram Bose Sarani, P.S. Tala on valuable Consideration Amount and measuring an area of about 1040 sq. ft. covered area consisting of 4 Bed Room, one Drawing, one Dining, one Kitchen, one Toilet and one W.C. as per annexed plan in the said Agreement for Sale dated 07.03.2006 within a period of 24 months from the date of Sanction of Building Plan. The Building plan was sanctioned on 08.03.2007. The said period was extendable for a further period of 4 months if necessary subject to Approval of the purchaser, which was 07.03.2009 with extension period up to four months that was **07.07.2009**. The Sanctioned Building Plan was valid till 07.03.2012, a copy of said Sanctioned Building Plan is in the Case record.

Late Mahamaya Khan, since deceased, erstwhile Developer and Respondent no.1, had written a letter to the Complainant on 30.11.2011 stating that she is unable to regularize the construction of the ground floor flat and have not got completion certificate or revised sanctioned plan from KMC in this regard so she requested the Complainant to take possession of flat no. 1D in the first floor and register the said flat in his name immediately. The said letter is annexed as Annexure-G with the Affidavit of the Complainant dated 24.07.2023.

From the Affidavit affirmed on 09.02.2024 by Samir Kumar Dey , since deceased, erstwhile Respondent no. 3, it is clear that he has never denied the bonafide claim of the Complainant to get right, title, interest and possession in respect of the flat No.1D in the first floor of the said premises in 35B, Khudiram Bose Sarani, P.S. Tala, Kolkata-700037 in terms and conditions of the Agreement for Sale dated 07.03.2006 in the said Affidavit.

During his life time the Respondent no. 3, since deceased, has raised points in his Application dated 17.02.2020 which has been later affirmed on 09.02.2024, by order of this Authority dated 09.11.2023, regarding maintainability and Arbitration clause in the Agreement for Sale. But, he had never mentioned any specific reason in support of his claim for non-maintainability of this Complaint Case before this Authority. The Complainant has countered this point in his Rejoinder on Affidavit affirmed on 06.03.2024.

In view of the provisions of section 88 of the Real Estate (Regulation and Development) Act, 2016, this Authority is of the considered view that this Complaint Case is maintainable before this Authority. Regarding the issue of Arbitration Clause in the Agreement for Sale, this Authority is of the view that where there are provisions of section 31 and section 88 of the Real Estate (Regulation and Development) Act, 2016, for filing a Complaint by any aggrieved person for violation of any provisions of this Act, therefore the Arbitration Clause will not come in the way of such right. The provisions of Act will always prevail and override over any clause of the Agreement for Sale. So this Authority is of the opinion that the Complaint Case is completely maintainable in all respects.

These objections of the Respondents are accordingly not accepted and hereby rejected. This Authority is now going to proceed for adjudicating the Complaint Case holding the same maintainable. Now the Authority is entering into the merit of the Complaint case.

Respondents who have prayed for expunging their names and release from any sort of liabilities in connection with this Complaint Case cannot be allowed and hence rejected, in view of the Development Agreement dated 25.08.2005 and the Registered Power of Attorney dated 24.08.2005 in respect of the said premises.

During her life time, Mahamaya Khan, Since deceased, the erstwhile Developer and Respondent no.1, proprietor of M/s. M.K. Designer through her letter dated **30.11.2011** requested the Complainant to take over Possession of the **flat no.1D** in the first floor of the said premises. She also received **Rs.45,000/-** as part payment of the consideration amount in respect of Sale of the said flat on **12.05.2017** against proper Money Receipt. A Notarized copy of the said letter dated **30.11.2011** and Notarized copy of the said **money receipt** dated **12.05.2017** in respect of the Sale of the said **flat no 1D** in the first floor of the said premises have already been submitted by the Complainant being annexure '**G**' and Annexure "**N**" at pages nos. 55-56 and 76 respectively alongwith the Affidavit affirmed by the Complainant on 24.07. 2023. But She ultimately did not hand over the said flat to the Complainant.

In a letter the Respondent no.2 has **offered flat no.1D** of the first floor in the said premises. In the letter dated **02.07.2015** Shri Dilip Saha wrote that he offered in the first floor, **flat no.1D** of the said

premises within four months from the issue of said letter but which he also ultimately did not hand over to the Complainant. Notarized copy of those letters are annexed to Affidavit affirmed on 24.07.2023 by the Complainant being Annexure "M" pages no. 74-75.

After substitution, Shri Tapajyoti Khan, now the Respondent No.1 the only legal heir and successor of Late Mahamaya Khan, erstwhile Developer submitted his Reply on affidavit affirmed on 16.02.2024 that he is willing to handover physical possession of the **flat no.1D in the first floor of the said premises no 35B, Khudiram Bose Sarani, P.S. Tala, Kolkata -700037** which was his mother's allocation by executing deed of conveyance in favour of the Complainant in his affidavit at para no.2.

It is very much pertinent to mention here that in para 3 of the said Affidavit he has admitted that the Complainant Shri Dinesh Chandra Agarwal is entitled to get possession of the first floor being **Flat no.1D**, and He is willing to handover first floor being **flat no 1D** and to execute deed of conveyance in favour of Shri Dinesh Chandra Agarwal, the Complainant herein.

In para 4 of the said Affidavit he further admitted that his mother offered for taking possession of the first floor **flat no 1D** to the Complainant and also gave consent to get Electricity Meter in his name from CESC Limited and which will be evident from letter dated **07.05.2015** issued by his mother, Notarized Copy of which letter is annexed to Affidavit affirmed on 24.07.2023 by the Complainant being Annexure "L" **page no.73**

In the said Affidavit he has also admitted that his mother, erstwhile developer, since deceased, had received part payment from Sri Dinesh Chandra Agarwal for Sale of **flat no 1D** in the first floor of the said premises.

Respondent no.1 also prayed before the Authority to pass order / direction to all Respondents to make Deed of Conveyance in favour of the Complainant.

The Respondent nos. 6 and 7, who appeared before the Authority on 19.03.2024, have not expressed any objection in their Affidavits or through submission regarding transferring the flat no.1D in the First floor of the said premises no. 35B, Khudiram Bose Sarani, P.S. Tala, Kolkata-700037.

Other Respondents are absent despite due service of notices for hearing through speed Post and also by electronic mode of communications to them and they have not entered their appearance before this Authority today at the time of hearing or on earlier dates of hearing either in person or through pleader and they have never contradicted the claims of the Complainant. Hence, the Doctrine of Non traverse, meaning thereby, -"where a material averment is passed over without specific denial, it is taken to be admitted" will apply in their cases. In the instant case, they have not even contradicted or

made any general denial.

This Authority is of the considered view that Agreement for sale was executed between the Complainant and Late Mahamaya Khan, since deceased, the erstwhile Developer and Shri Dilip Saha, the so called Assignor on 07.03.2006. The Complainant is entitled to get possession of the flat 1D in the first Floor of the said premises within **07.07.2009** but he has not been handed over possession right, title and interest of the flat by the Respondents till date, the said activities of the said Respondents, as stated above, are not only gross violation of the terms and conditions of the said Agreement for Sale dated 07.03.2006 but also the provisions of the RERA Act,2016. So, in view of the facts and circumstances of the instant Complaint Case, the Complainant is entitled to get possession alongwith, right, title and interest, free from all encumbrances of **flat no.1D** in the first floor of the premises no. 35B, Khudiram Bose Sarani, P.S. Tala, Kolkata 700037.

Thus, it is as clear as birds eye view to the Authority, after verifying all documents and Case records placed before it, that the Complainant has successfully made out clear case of gross violation of the terms and conditions of the Agreement for Sale dated 07.03.2006 by all the Respondents and they have also violated the provisions of RERA Act, 2016, specifically section 18 of the said Act by not delivering possession to the Complainant within scheduled timeline. In terms and conditions of the said Agreement for Sale dated 07.03. 2006, the Complainant is entitled to get peaceful possession, right, title and interest in respect of the said **flat no.1D** in the first floor of the said **premises no.35B, Khudiram Bose Sarani, P.S. Tala, Kolkata-700037** within 07.07.2009 which he has not received till date for activities and/or willful non-performance of proper duties, functions, responsibilities by all the Respondents as per provisions of RERA Act, 2016 and Rules framed there under.

Hence it is hereby,

**Ordered,**

- a). That the Respondent no.1 shall execute **Deed of Conveyance** and shall simultaneously deliver physical peaceful and vacant possession, free from all encumbrances of the **Flat no.1D** in the First Floor of the Premises no. 35B, Khudiram Bose Sarani, P.S. Tala, Kolkata -700037, within **45 days** from the date of the receipt of this order of the Authority through email / by Speed Post or other modes of Electronic Communication whichever is earlier; and
- b). The Complainant is also directed to pay the balance consideration amount of Rs.58,000/- ( Rupees Fifty Eight Thousand only) as per Agreement for Sale dated 07.03.2006 on the self same date, simultaneously at the time of execution of Deed of Conveyance to Respondent no.1 by Pay Order/ Demand Draft / Bankers Cheque; and

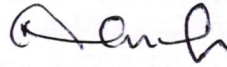
c). All the Respondents are directed to must remain present without fail at the time of handing over the physical possession of the said **flat no. 1D** in the first floor of the said Premises and execution of the Deed of Conveyance and render all necessary co-operation and perform all necessary legal formalities, as may be required, in this regard so that the Complainant gets peaceful possession and transfer of right, title, interest, free from all encumbrances in respect of the said flat without any hazards; and

d). After the Complainant gets possession and gets executed Deed of Conveyance, all Respondents shall also be liable to hand over authenticated copies of all documents as are required as per law in respect of Flat No. 1D in the First Floor within **30 days** from the date of getting possession to the Complainant.

All the parties must comply with the orders as mentioned above, failing which , the Authority may proceed in terms of all the provisions more specifically sections 38, 61 and 63 of the RERA Act,2016.

With the above directions the matter is hereby disposed of.

Let copy of this order be served to all the parties by speed post and by electronic mode of communication immediately.



(SANDIPAN MUKHERJEE)

Chairperson

West Bengal Real Estate Regulatory Authority



(BHOLANATH DAS)

Member

West Bengal Real Estate Regulatory Authority



(TAPAS MUKHOPADHYAY)

Member

West Bengal Real Estate Regulatory Authority