

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

Complaint No. WBRERA/COM000891

Gitesh Tikmani Complainant

Vs

Yes Bank Limited Respondent

Sl. Number and date of order	Order and signature of the Authority	Note of action taken on order
01 07.06.2024	<p>Chartered Accountant Gopal Krishna Lodha, being Authorized Representative of the Complainant, is present in the physical hearing today 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 filing vakalatnama and signed the Attendance Sheet.</p> <p>Heard both the parties in detail.</p> <p>As per the Complaint Petition:-</p> <ol style="list-style-type: none">1. The Complainant has booked a residential apartment being flat no. 20C, Block- 'A' on 20th floor in the project "IDEAL EXOTICA" having carpet area of approximately 1566 sq.ft. along with balcony/terrace measuring carpet area of 151 sq.ft. and having built up area of 1869 sq.ft. and super built area of 2560 sq.ft. and alongwith one covered car parking and one basement car parking.2. The Complainant paid the entire consideration amount of Rs. 1,99,00,001/- and registered the Conveyance Deed on 17.11.2021 at DSR-II, Alipore, South 24 Pgs (Book -1, Volume No. 1602-2021, Pages from 446991 to 447047 being no. 160210473 for the year 2021) and received the ownership of the said Unit and received the peaceful vacant possession of flat no.20C, Block - 'A' on 20th floor in the project 'Ideal Exotica'.3. The Complainant got his flat mutated with Kolkata Municipal Corporation vide Mutation case no.0/081/25-MAY-23/147029 dated 25.05.2023 and was allocated assessee no. 110812302528 and since then he has been paying the property tax as and when are due.4. The Complainant has been residing peacefully in the above mentioned flat for almost 1 year and has been paying the maintenance charges to Ideal Exotica Flat Owners Association as and when are due.5. The Complainant was shocked to learn about the public notice of	

symbolic possession in a newspaper dated 16.03.2024 about his flat as mentioned in point -1.

6. The public notice of symbolic possession was issued pursuant to direction passed in O.A. No. 2 of 2024 by Debts Recovery Tribunal-1, Kolkata on 21.02.2024.
7. The Debts Recovery Tribunal-1, Kolkata passed an order in O.A. No.2 of 2024 in the recovery case filed by Yes Bank Limited against Ideal Real Estates Private Limited.
8. Ideal Real Estates Private Limited has taken term loan from Yes Bank Limited against the mortgage of various flats including the flat of the complainant (Flat No. 20C, Block-A on 20th floor in Project "IDEAL EXOTICA") and has failed to repay the amount of loan taken alongwith interest.
9. Pursuant to failure of Ideal Real Estates Private Limited to repay the loan obligation, Yes Bank has declared Ideal Real Estates Private Limited as Non-Performing Asset (NPA) and subsequently moved with taking possession of the flat of the Complainant with effect from 15.03.2024.
10. The Complainant being the bonafide buyer was surprised with the instant proceedings by Yes Bank Limited since the Complaint has received the peaceful and vacant ownership of the property subsequent to the Conveyance Deed on 17.11.2021 at DSR-II, Alipore, South 24 Pgs (Book -1, Volume No. 1602-2021, Pages from 446991 to 447047 being no. 160210473 for the year 2021).

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

1. To direct the Yes Bank Limited to stop all proceedings with respect to the scheduled property and restrain from taking possession of the property.
2. To direct the Yes Bank Limited to release the flat of the Complainant from the process of recovery proceedings.
3. To quash, cancel and terminate the notice issued by Yes Bank Limited dated 16.03.2024.
4. To direct Debt Recovery Tribunal-1, Kolkata to recall the order dated 21.02.2024 passed in O.A. No. 02 of 2024 (Yes Bank Limited Vs. Ideal Real Estates Private Limited).
5. To direct the Receiver as appointed in the instant matter from taking any further steps in connection with the said property.
6. To stay all further proceedings by any concerned in connection with the possession of said property.

The Complainant prays before the Authority for the following interim orders:-

1. To direct the Yes Bank Limited to stop all proceedings with respect to the scheduled property and restrain from taking possession of the property.
2. To direct the Yes Bank Limited to release the flat of the Complainant from the process of recovery proceedings.
3. To quash, cancel and terminate the notice issued by Yes Bank Limited dated 16.03.2024.

4. To direct Debt Recovery Tribunal -1, Kolkata to recall the order dated 21.02.2024 passed in way no. 02 of 2024 (Yes Bank Limited vs Ideal Real Estates Private Limited).
5. To direct the Receiver as appointed in the instant matter from taking any further steps in connection with the said property.
6. To stay all further proceedings by any concerned in connection with the possession of said property.

The Complainant stated at the time of hearing that the Mutation and Registration of the Deed of Conveyance in respect of the subject matter flat has already been done in favour of the Complainant and Complainant is in the peaceful possession of the subject matter flat that is **flat no. 20C (Block - 'A', 20th Floor)**, and he is paying regular maintenance charges to the Ideal Exotica Flat Owners' Association as and when are due. He requested for necessary direction for stay of all the proceedings taken by the Respondent Bank.

The Advocate of the Respondent 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 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 provision contained in section 13(4) of the SARFAESI Act.

He also stated that the Promoter Ideal Real Estates Private Limited should be made a party in this matter for proper adjudication of this matter.

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 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 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 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 as per the definition of Promoter in the RERA Act in the present case.

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 RERA 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 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. Already registration and mutation of the flat has been done in favour of the Complainant and he is in the peaceful possession of the said 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 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, the Authority is pleased to

give the following directions:-

- a) The Respondent Yes Bank Limited is hereby directed to stop all the proceedings including notice for auction, if any, with respect to the scheduled property that is **flat no. 20C (Block - 'A', 20th Floor)** and restrain from taking possession of the said property, till the disposal of this matter or until further order, whichever is earlier.
- b) An order of **stay** is hereby imposed upon the notice issued by the Yes Bank Limited dated 16.03.2024, till the disposal of this matter or until further order, whichever is earlier.
- c) The Receiver appointed in the instant matter is hereby directed to restrain from taking any further steps in connection with the subject matter property.
- d) An order of **stay** is hereby imposed on all further proceedings by any concerned in connection with the possession of the Complainant in the subject matter property, till the disposal of this matter or until further order, whichever is earlier.
- e) 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 Affidavit (in original) to the Authority, serving a copy of the same to the Respondent, both in hard and scan copies, within **30 (thirty)** days from the date of receipt of this order through email.
- f) 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 Affidavit (in original) to the Authority serving a copy of the same to the Complainant, both in hard and scan copies, within **30 (thirty)** days from the date of receipt of the Affidavit of the Complainant either by post or by email, whichever is earlier.

Fix **21.08.2024** for further hearing and order.



(BHOLANATH DAS)

Member

West Bengal Real Estate Regulatory Authority



(TAPAS MUKHOPADHYAY)

Member

West Bengal Real Estate Regulatory Authority