

ORDER SHEET

WEST BENGAL HOUSING INDUSTRY REGULATORY AUTHORITY

Complaint No. COM-000192

Partha Sarathi DuttaComplainant

AND

Swanhousing & Infra Pvt. Ltd.Respondent

Sl. Number and date of order	Order and signature of Officer	Note of action taken on order
8 ----- 24.02.2021	<p>Complainant is present alongwith his Advocate Shri Devajyoti Barman and Smt. Sanjukta Basu Mallick in the online hearing filing hazira and vakalatnama through email.</p> <p>Ld. Advocate Smt. Binota Roy representing the Respondent, is also present in the online hearing filing hazira through email.</p> <p>Heard both the parties at length.</p> <p>The Respondent promoter preferred an appeal before the Hon'ble Housing Industry Appellate Tribunal (hereinafter referred to as 'WBHIAT'), assailing the order dated 29.01.2021, passed by this Authority. The appeal was admitted as HIAT-MISC. APPEAL-003/2021, with the cause-title - 'Swanhousing and Infra Private Limited – V - Shri Partha Sarathi Dutta.'</p> <p>After hearing both the parties, the Hon'ble Tribunal is pleased to allow the appeal in part as stated in Para 21 of the order of the Hon'ble Tribunal dated</p>	

19/02/2021 in the appeal mentioned above and pleased to set aside the order dated 29.01.2021 of this Authority regarding allowing the amendment for inclusion of the relief of compensation for delay and further requested this Authority to expedite the pending hearing on other points as indicated in the impugned order dated 29/01/2021 of this Authority bearing into mind only the relief(s) for adjudication, of course together with the point of maintainability, if it is pressed. The Hon'ble Tribunal also stated that ,-"By this however, we are not coming on the way of the learned authority who are at liberty to adjudicate on the point of deviation between the proposed draft deed of conveyance and the agreement of sale (executive by the parties), and to set it at right upon hearing both sides".

As per the order of the WBHIAT mentioned above, the Respondent submitted on 24/02/2021 before this Authority an application on notarized affidavit challenging maintainability of the complaint petition bearing Complaint No. – 000192, after serving a copy to the Complainant.

Let the application on affidavit, challenging maintainability, submitted before this Authority, on 24.02.2021, be taken on record.

The Respondent submitted in Para-3 of the affidavit,'-"that pursuant to the order passed by the Learned Authority and by the mutual consent by the parties delivery of physical possession of the flat being flat no. – 6304 on the 3rd floor of the building in Block – 6 in the project name "SwanGreen" being developed by the respondent was completed on 24/01/2020. While taking possession, the

complainant signed possession letter dated 24/01/2020 containing a declaration wherein he confirmed to have received peaceful and vacant possession of his property and further declared that he has no claim whatsoever, against the Respondent promoter.”.

At para-6 of the maintainability application, the Respondent submitted that the very maintainability of the original complaint petition needed to be decided in view of the Complainant signing without protest the possession letter dated 24.01.2020, wherein he inexplicitly and unambiguously declared that he has no claim whatsoever against the Respondent promoter.

After hearing both the parties, on the point of maintainability, the Authority is of the considered view that this matter is very much maintainable before this forum on the following grounds:-

- 1) As a basic rule of adjudication as provided in Civil Procedure Code, 1908, the ground of maintainability must be taken by the respondent just after the admission hearing. In this matter, on the date of first hearing of this matter and also on 16.01.2020 and also on the second date of hearing i.e. on 24.02.2020 and also on the 3rd date of hearing that is on 11.01.2021, the Respondent did not agitate the point of maintainability of this instant complaint petition before this forum. Now, at this stage, when the matter has been admitted, issues / points to be adjudicated have been framed, no. of orders have been issued, delivery of possession has been taken place

between the parties as per order of this Authority dated 16.01.2020 and now just one issue / point is left / remained to be decided. In this juncture taking up the matter of maintainability is not at all permissible and cannot be allowed and it is a part of delaying tactics practiced by the Respondent. In this way the Respondent is obstructing / hampering the system of delivery of justice.

- 2) As a settled principal of law Deed of Conveyance should be in the same line with the Agreement for Sale and no effective variations / deviations is permissible. For this reason, only the proforma of Agreement for Sale is given in the Annexure-'A' of the West Bengal Housing Industry Regulation Rules, 2018, as because deed of conveyance always go in the same line and contains the same matter. Therefore, no separate proforma is generally required, only proforma for Agreement for Sale serve the purpose adequately. Therefore, the contention of the respondent that only the proforma for agreement for sale is given in WBHIRA Rules and as there is no proforma for deed of conveyance in the WBHIRA Act or Rules, therefore, the examination of correctness of the proforma / draft deed of conveyance by the Authority being outside the purview of Jurisdiction of WBHIRA Authority has no ground.
- 3) Several provisions are there in the WBHIRA Act and Rules, which can be taken into consideration that proves beyond doubt that examination of the correctness and validity of deed of conveyance is very much within the

purview and jurisdiction of the WBHIRA Authority. The said provisions are enumerated below:-

- (i) Section 4 sub-section (1) & sub-section (2) of the WBHIRA, 2017 provides that every promoter shall make an application to the WBHIRA Authority for the registration of the real estate project, in such form, manner, within such time as accompanied by such fees as may be specified and the promoter shall enclose certain documents alongwith the application for registration.

Clause (g) of sub-section (2) of section 4 provides that the promoter shall enclose alongwith the application for registration the proforma of the allotment letter, an Agreement for Sale and the Conveyance Deed proposed to be signed with the allottees.

Therefore, examination of the proforma conveyance deed is very much within the Jurisdiction of the WBHIRA Authority. At the time of registration of the real estate project under WBHIRA, the Authority is empowered to examine the correctness and validity of the proforma deed of conveyance as per Sec. 4(2) (g), of the WBHIRA Act., 2017.

- (ii) Section 17 sub-section (1) of the WBHIRA Act provides that, "the promoter shall execute a registered conveyance deed in favour of the allottees alongwith the undivided proportionate title in the

common area to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that in absence of any local law, conveyance deed in favour of the allottees or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.”

Therefore, the above provision contented in WBHRA Act, 2017 indicates that the matter relating to deed of conveyance is well within the purview of the WBHRA Authority and therefore, the instant matter regarding the examination of the differences and variations, if any, between the Agreement for Sale & Deed of Conveyance as alleged by the Complainant is absolutely within the power and jurisdiction of this Authority and the contention of the Respondent that the Authority has no power in this case has no legal ground.

(iii) Clause (a) of sub-section(4) of Section11 provides that ,- "The promoter shall be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale or to the associations of allottees, as the case may be, till the conveyance of all the apartment plots or buildings, as the case may be, to the allottees, or the common areas to the associations of allottees or the Competent Authority, as the case may be;

Provided that the responsibility of the promoter with respect to the structural defect or any other defects for such period as is refer to in sub-section (3) of sec 14, shall continue even after the conveyance deed of all the Apartments, plots or buildings, as the case may be to the allottees are executed;

Therefore, this above provision also shows that the examination of deed of conveyance is well within the purview of the WBHRA Act. and Rules.

(iv) Clause (f) of sub-section (4) of Section 11 provides,- "The promoter shall execute registered conveyance deed of the apartments, plots or buildings, as the case may be in favour of the allottee alongwith the undivided proportionate titled in the common

areas to the associations of the allottees or competent Authority as the case may be as provide under Section 17 of this Act.

The above provision indicates that the WBHIRA Authority has jurisdiction for examination and pass necessary order in respect of the obligations and liabilities of the promoter in respect of deed of conveyance.

- (v) Sub-section (11) of section 19 provides that,- "Every allottees shall participate towards registrations of the conveyance deed of the apartments, plots or buildings, as the case may be, as provided under sub-section (1) of section 17 of this Act.

Above provision indicates that WBHIRA Authority has the power the jurisdiction to examine and pass necessary order in respect of the liabilities and obligation of the allottees in respect of deed of conveyance. Therefore, the Authority has Jurisdiction to examine and issue necessary order, in respect of proforma, drafting, execution and registration of deed of conveyance in respect of violations made by both the promoter and the allottee in their obligations as provided in the WBHIRA Act., 2017.

(4) The Respondent also alleged that the Complainant at the time of taking delivery of possession has signed a possession letter dated 24.01.2020 ,containing the declaration that he has received peaceful and vacant possession of his Flat and he has no claim whatsoever, against the respondent relating to the said flat. The Respondent alleged that this complaint petition is not maintainable as the complainant has waived all his rights by signing the possession letter.

The possession letter signed by the Complainant which is annexed as Annexure-'A' with the application on affidavit on maintainability of the Respondent may be taken into consideration. The statement made by the Complainant in the possession letter is reproduced below:-

"I/We confirm to receive having vacant and peaceful possession of Unit No.- 6304 at 3rd Floor at 'SwanGreen' to my/our full satisfaction and I/We have no claim, whatsoever against the Developer/Promoter/Owners relating to the said unit."

A careful examination of the possession letter shows that it relates only to the handing over and taking over of vacant and peaceful possession of the flat from Respondent to the Complainant and the Complainant has taken the vacant peaceful possession of the flat to his full satisfaction and he has no claim regarding the delivery of possession of the flat against the

Developer/Promoter/Owners, as the case may be.

The very name and nomenclature of "Possession letter" signifies that it should only contain provisions/clauses/undertakings and/or waiver or estoppels, if any, only in respect of delivery of possession. Other than possession, no more condition or clauses or liabilities or rights should be created or restricted by the possession letter. Any other terms, rights or obligations, if the Respondent tries to fit in the possession letter by mischief, is not at all admissible.

Again, the possession was delivered as per the direction of the Authority in the order dated 16.01.2020. Without taking the permission / leave of the court, no more terms and conditions should be inserted in the possession letter.

Therefore, the signing of the possession letter by the Complainant amounts to waiver or estoppels, as alleged by the Respondent, is not acceptable to this Authority. This letter only signifies that the Complainant has taken vacant and peaceful possession of the flat from the Respondent and he has no claim in the matter of taking possession against the Respondent.

(5) Agreement for sale executed between the parties on 23rd March, 2018, confers certain rights and obligations upon both the parties. If the Respondent intentionally inserting some words/clauses in the possession letter, is now trying to prove that the Complainant has waived his rights as conferred in the agreement for sale, so this contention of the Respondent is not at all tenable. The rights and

obligations conferred by the agreement for sale continues forever and signing of possession letter in no way curtails or decreases the rights and obligations of any of the parties in any way.

(6) The agreement for sale contains a clause that the parties will execute a deed of conveyance after delivery of possession and the deed of conveyance shall contain rights and obligations in the same line with the Agreement for Sale. Therefore, the Complainant has right to file complaint under HIRA, if there is any deviation or variation and / or discrepancies, contradiction between the rights and obligations conferred by the agreement for sale and by the deed of conveyance.

Taking into consideration the above points and after examination of the documents and evidences produced by both the parties, it is hereby

Ordered,

that this Complaint Petition is very much maintainable before this forum and therefore, now, in the light of the order dated 19.02.2021 of the Hon'ble WBHIAT, this Authority shall heard the parties regarding the deviations, variation, discrepancies or contradictions between the Agreement for Sale and the Deed of Conveyance as alleged by the Complainant.

Both the parties were heard on the point of the deviations or contradiction between the agreement for the sale and the draft deed of conveyance at length.

After hearing both the parties, the Authority is pleased to order the followings:-

(A) In respect of point no. 1 of the comparative chart as annexed with the affidavit of the Complainant dated 17th March, 2020, containing the variances or violations in respect of proposed draft deed of conveyance dated 30.11.2019 (hereinafter referred to as the 'draft deed') in a comparative table format (hereinafter refer to as 'Comparative Chart').

In respect of point no. 1 of the comparative chart, the Respondent is directed to provide the Complainant, authenticated photo copies of the 23 separate agreements executed between the 23 owners and the developers by which the owners have transferred full and absolute rights to the developer for sale and transfer.

Without examination of these agreements, it is not possible for the Complainant to sign the deed of conveyance, containing the clause that:- the Complainant has full satisfaction regarding the title of the developers. In the agreement for sale, at Article (II) in point (2) it is given that, - 'the purchaser has

satisfied himself as the title of the owners.'. But the Respondent again with malafide intention submitted in their counter affidavit that, - 'the purchaser has satisfied himself as to the title of the developers.'. The statement of the respondent is completely false statement. Here, the Complainant has satisfied himself about the title of the 23 owners. But he has not inspected or he has not got the opportunity from the respondent to inspect the 23 agreements executed between the 23 owners and developers by which owners have transferred their full and absolute rights to the developer for sale and transfer of the flats alongwith car parking spaces.

(B) In respect of Point No. 2 of the Comparative Chart, the Respondent is directed to provide the Complainant a Certificate being the report on title of its advocate. He is also directed to provide the complainant a copy of the Sanctioned Plan & Completion Certificate (CC) before the execution of the deed of conveyance.

The points which are mentioned in the draft deed regarding the report on title and sanction plan and where it is specifically stated in the draft deed that the allottee / purchaser has inspected and satisfied himself about the things as mentioned above, therefore, respondent should provide the complainant, the said documents before the execution of the deed of conveyance.

(C) In respect of Point nos. 3 of the comparative chart, this authority is of the opinion that the Respondent has clearly violated the provision of the section 14 Sub section (3) of the WBHRA Act, 2017. The respondent is hereby directed to amend the draft deed and provide the whole provision of Sec 14 Sub section (3) in the draft deed, in respect of Point No. 3 of the comparative chart and in respect of provision contained in pages 22 & 23, clause 3.2 (iii) of the draft deed.

(D) In respect of Point No. 4 of the comparative chart i.e. with respect to the provision given in Page 25, Clause 3.3.1, the Authority directed the respondent to include the following alongwith the given provision in the draft deed:-

"The Bills and demands for the amount payable by the allottees / purchasers shall be deemed to have been served upon the allottees / purchasers, in case the same is left in the said Unit & E-mail communication has been sent to them, in this regard.

(E) In respect of the point no. 5 of the comparative chart i.e. in respect of provision contained in page 25, clause 3.3.2, the said provision shall be in

conformity with the provision of Sec 11 sub-section (4) Clause (g) of the WBHIRA Act, 2017.

(F) In respect of point no. 6 of the comparative chart i.e. in respect of the provision contained in page 27, Clause 3.8 (ii) of the draft deed, this Authority directs the Respondent that this provision should be amended in conformity with the related provision contained in the agreement for sale.

(G) In respect of point no. 7 of the comparative chart, i.e. the provision contained in Page 32 & 33, Clause 6.2, this Authority directs the Respondent that this provision in the draft deed contradicts with the clause contained in page 34, Clause 9.3 (i) of the Agreement for Sale, therefore, it should made in the same line and in conformity with the related provision of the Agreement for Sale.

(H) In respect of point nos. 8 of the comparative chart, related to the provision contained in page 37, Clause 6.15 of the draft deed, this Authority is of the opinion that the said provision of the draft deed contradicts and violates Sec. 14 sub section (3) of the WBHIRA, 2017 and therefore, Respondent is hereby directed to make the said provision strictly in conformity with the provision contained in Sec-14 Sub-Section (3) of the WBHIRA Act, 2017.

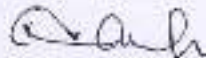
(I) In respect of Point No. 9 of the Comparative Chart relating to the provision contained in Page 29, Clauses 4.1(a) (b) & 4.1.1 of the draft deed, this

Authority is of the opinion that there is a clear variation with the related clause of the agreement for sale contained in page 42, Clause 16.7. The Respondent is directed to modify the said provision of the draft deed in full conformity with the related provision of the Agreement for Sale.

(J) In respect of the Point no.10 of the comparative chart relating to the provision of page 41 of the draft deed, the Authority is of the opinion that there is variation from the related provision contained in the agreement for sale and the Respondent is hereby directed to modify the said provision to make it in conformity with the provision contained in the Agreement for sale.

With the above directions, this matter is thus disposed of.

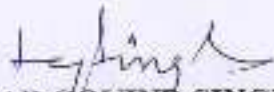
Let copy of this order be served to both the parties, in all of their addresses & also thorough email.



(SANDIPAN MUKHERJEE)

Chairperson

West Bengal Housing Industry Regulatory Authority



(HAR GOVIND SINGH)

Member

West Bengal Housing Industry
Regulatory Authority



(TAPAS MUKHOPADHYAY)

Member

West Bengal Housing Industry
Regulatory Authority