

**ORDER SHEET**


**WEST BENGAL HOUSING INDUSTRY REGULATORY AUTHORITY**

**Complaint No. COM-000128 of 2019**

**Saptaparna Ray.....Complainant**

**AND**

**Hemont Sikaria.....Respondent**

Sl. Number and date of order	Order and signature of Officer	Note of action Taken on order
<p style="text-align: center;">4</p> <p>-----</p> <p>18-12-2019</p> <p>Dictated &amp; corrected by me</p> 	<p>Complainant is present filing hazira.</p> <p>Respondent is represented by Ld. Advocate Mr. Ranjit Rajak.</p> <p>Heard the parties.</p> <p>Complainant paid Rs.56,43,369/- against flat no. 3/1, A2 and confirmed as per communication made by Respondent from email <a href="mailto:cms@mounthillrealty.com">cms@mounthillrealty.com</a> on 13/02/2018 duly acknowledged the receipt of the amount including taxes and noted that further payment of Rs.551714/- including extra cost due to be paid by the Complainant.</p> <p>Mr. Hemont Sikaria in his affidavit filed before the Authority dated 30/09/2019 at para 5 on page no.3 mentioned the amount of Rs.54,76,713/- and service tax of Rs.166856/- as claims of the Complainant. The affidavit of the Respondent did not dispute the figure claimed by the Complainant, but commented this as exaggerated amount.</p> <p>The Complainant adduce evidence in support of the deposits that the payment of instalment has been made between March, 2013 to December, 2016 and it is submitted by the Complainant that there are no default on the part of the Complainant in making payment to the Respondent. The Respondent in his written response on affidavit claimed that the Complainant</p>	

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approached him over telephone on 8<sup>th</sup> November, 2018 with the request to introduce to a intending purchaser who could purchase the said flat and further it is also stated that Respondent replied that he informed his inability to identify any purchaser as requested with the advise to the Complainant to find a suitable intending purchaser and that the Complainant must transfer the agreement for sale in favour intending purchaser. The Respondent pray for dismissal of complaint petition as not maintainable and also stated that all the claims in the conclusion part of the complaint petition are false and Respondent have no intention to cheat to any of his customer.

Examined the sale agreement.

The sale agreement between parties provides for possession of the flat within June, 2017 in terms of clause 9.5 with extended period of six months allowed to the developer. The agreement provides for payment of consideration amount of Rs.5764750/- by Complainant as agreed between the parties before delivery of possession of the flat in terms of clause 9.6.2. The notice for possession as per actual or deemed date of possession is required to be issued to the Complainant within 15 days prior to date of such possession. It is claimed by the Respondent on affidavit that he is ready to hand over possession of the flat to the Complainant but the Complainant refused to do so and asked for refund of entire amount which the Respondent is also ready to refund after deducting the cancellation charges as per terms and conditions of sale agreement.

It is noticed that Respondent Company is claiming to invoke the provisions of clause 11.1 related to termination of sale agreement and its effects whereas Complainant claims that there are breach on part of seller and therefore, clause 11.3 are applicable.

For the sake of convenience I quote the clause 11.1.

“The buyer shall have the right to terminate this Agreement at any time and if the Buyer does so, the developer shall deduct 10% of the total paid amount against the particular flat or flats, after deducting any interest or, incidental expenses due. Seller will provide supporting bills/documents for

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incidental expenses (if any). The Taxes paid by Buyer till the date of cancellation acceptance by Seller, will not be refunded” and clause 11.3 read as “ Without prejudice to the provisions of Clause 9.5 above, in the event the Sellers fail and/or neglect to perform any of the Sellers’ Covenants, this Agreement shall, at the option of the Buyer, stand cancelled and/or rescinded, upon which the Developer shall refund to the Buyer all payments received till that date, with interest @ 12% per annum, from the date of payment to the date of refund. If the Buyer opts not to cancel this Agreement, then also the Developer shall pay to the Buyer interest @12% per annum, for the entire, period of delay.”

Now in order to satisfy the requirement of clause 11.1, this is enabling provision confirming right to buyer, who can terminate the agreement within period of delivery of possession and in the event of buyer exercising this right the clause as under clause 11.1 shall be applicable. In the absence of any written communication or letter or application from the buyer within the original time period of issuing notice for possession, this can not be claimed that this is the case of termination of sale agreement in excise of right to terminate by the buyer or any such offer for cancellation accepted by the seller within December, 2016 i.e, the time period for delivery of possession as per obligations of agreement. There are several email communications between the parties after December, 2016 and such communications filed by the parties in their written response does not disclose any steps for cancellation of the agreement by buyer in exercise of right under clause 11.1. Respondent has referred to telephonic enquiries as regards finding intending purchaser, non exercised right to terminate on 8<sup>th</sup> November, 2016 or within period of possession.

Ld. Advocate of the Respondent was offered to adduce any other evidence or document during the course of hearing and in all fairness it is stated he is nothing more to add as written response on affidavit filed by the Respondent Company already submitted to the Authority and takes on record. No additional points of argument were forwarded by Ld. Advocate, even on further opportunities accorded by the Authority.

Complainant also did not adduce further documents stating that the documentary evidence of payments and written counter affidavit have already been submitted before Authority in support of the complaint petitions and prayer made therein.

Complainant submitted that email communication made to the Respondent Company for refund of the deposits along with admissible rate of interest in terms of clause 11.3.

After considering all these submissions and examining the facts of the case this is proved beyond reasonable doubt that Respondent has defaulted in fulfilment of commitment of agreement and that breaches of clause 11.3 of the agreement are established, for the reasons already stated in this order.

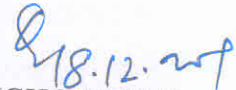
Ordered,

that Respondent shall refund entire amount paid by the Complainant along with rate of interest calculated at the rate of 12% per annum on deposits from the date of payment of such amount to the Respondent Company by the Complainant till date of refund. The entire amount of Rs.54,76,713/- and service tax of Rs.1,66,856/- shall be paid within 45 days from date of communication of this order.

Be it noted that Complainant is at liberty to file prayer for execution of this order and invoke the relevant provisions of WBHIRA Act, 2017 in the event of Respondent Company does not comply the order.

Complaint petition is thus disposed off.

Communicate this to both parties.

  
(ONKAR SINGH MEENA)  
Designated Authority,  
Housing Industry Regulatory Authority,  
West Bengal.