

**IN THE WEST BENGAL REAL ESTATE APPELLATE TRIBUNAL
KOLKATA - 700 075**

- Present: 1. Justice Rabindranath Samanta
Hon'ble Chairperson
2. Shri Gour Sundar Banerjee
Hon'ble Judicial Member
3. Dr. Subrat Mukherjee
Hon'ble Administrative Member

WBREAT/APPEAL NO. - 014/2024

Yes Bank Limited

..... Appellant

Stephen House, 56A, Hemanta Basu Sarani,
Ground and Mezaanine Floor,
Kolkata - 700 001.

- Vs -

1. Laxmi Narain Metallic Private Limited

.....Respondent No.1

Flat No. 21C, Block-A, 21st Floor,
Ideal Exotica,
21, Pramatha Chowdhury Sarani,
New Alipore, Kolkata - 700053.

2. Ideal Real Estates Private Limited

.....Respondent No.2

50, Jawaharlal Nehru Road, Post Office - Little Russel Street,
Police Station - Shakespeare Sarani, Kolkata - 700 071.

Mr. Sourjya Roy, Advocate

For the Appellant

Mr. Gopal Krishna Lodha, Chartered Accountant and
authorised representative

For the Respondent No. 1

Heard on : 09.12.2024

Judgment on : 09.01.2025

Rabindranath Samanta, J:-

Aggrieved by an interim order dated 07.06.2024 passed by the learned West Bengal Real Estate Regulatory Authority (For Short 'Regulatory Authority') in Complaint No. WBRERA/COM000888, the Appellant Yes Bank Limited has approached this Tribunal by preferring this appeal.

The complaint registered as WBRERA/COM000888 was brought by the Respondent No. 1 / Complainant Laxmi Narain Metallic Private Limited against the Appellant Yes Bank Limited. The Promoter namely Ideal Real Estates Private Limited was not a party to the Complaint. However, during hearing of the appeal, this Tribunal thought it proper to add the Promoter Ideal Real Estates Private Limited as a necessary party to the appeal. Accordingly, the Promoter has been impleaded as Respondent No.2 in the appeal.

Though, after service of notice upon it, the Respondent No.2 appeared before this Tribunal through a learned Advocate, but it did not file any pleading to contest the appeal. On the previous dates of hearing of the appeal, a learned Advocate appeared for the Respondent No.2 before us, but she stopped participating in the final hearing of the appeal on 09.12.2024.

The Complainant / Respondent No. 1 Laxmi Narain Metallic Private Limited filed the complaint with the learned Regulatory Authority on the facts which may be summarised as under:

On the representation made by the Promoter Ideal Real Estates Private Limited, the Respondent No.1 booked one residential apartment being Flat No. 21 C, Block - 'A' on 21st Floor in a project namely 'Ideal Exotica' at Premises No. 21, Pramatha Chowdhury Sarani, New Alipore, Kolkata - 700 053, having a carpet area of 1485 Sq. feet (approximately) along with exclusive balcony / terrace / garden measuring carpet area of 32 Sq. feet and having built-up area of 1748 Sq. feet and super built-up area of 2395 Sq. feet together with a covered car parking space. The Respondent No. 1 entered into an agreement for sale with the promoter on 7th August, 2021 for purchasing the aforesaid flat at the consideration of Rs. 1,95,68,327/- (Rupees one crore ninety five lacs sixty eight thousand three hundred and twenty seven only). While the Respondent No.1 entered into the agreement, there was nothing in the records of the learned Regulatory Authority / WBHIRA that any mortgage had been created. The Respondent No.1, thereafter, got peaceful vacant possession of the flat since the date of agreement for sale on 7th August, 2021 and since then it is in occupation of the flat. The Respondent No.1 paid the entire consideration amount to the Respondent No.2 and in turn, the Respondent No.2

executed and registered a Deed of Conveyance on 17th November, 2021 in respect of the flat in favour of the Respondent No.1.

It is pertinent to mention that after purchase of the flat it became a member of the flat owners association namely 'Ideal Exotica Flat Owners Association'. After becoming a member of the association, the Respondent No.1 has been paying the maintenance charges in respect of the flat to the association since the date when it got possession of the flat. While it was in peaceful occupation of the flat, it became shocked after seeing a public notice of symbolic possession of the flat published in a daily newspaper dated March 18, 2024. This Respondent came to learn that the public notice of symbolic possession was issued pursuant to a direction passed by the Debts Recovery Tribunal-1, Kolkata, in O.A. No.2 of 2024 on 21.02.2024.

The Debts Recovery Tribunal passed the order in the aforesaid proceeding brought by the Appellant Yes Bank Limited against the Promoter. The Promoter Ideal Real Estates Private Limited took loan from the Bank and since the Bank failed to repay the loan, the Bank declared the accounts of the Promoter as Non-Performing Asset (NPA) and subsequently approached the Debts Recovery Tribunal for taking possession of the apartment belonging to the Respondent No.1. As a bonafide purchaser of the flat the Respondent No.1 was surprised with the aforesaid proceeding brought by the Bank for taking symbolic possession of its flat. The Respondent No.1 submits that before the mortgage was created in favour of the Appellant, there were already allotments and/or Agreements for Sale in respect of the flats of the project. This Respondent contends that without permission from the allottees, the purported mortgage could not have been entered into and as such the mortgage has now become ineffective. Since the Appellant Bank was in every mood to take physical possession of the flat and to sell it by auction in compliance with the order passed by the Debts Recovery Tribunal, the Respondent No.1 / Complainant by bringing the complaint before the learned Regulatory Authority sought for the following reliefs :

- "1) To direct the Yes Bank Limited to stop all proceedings with respect to the schedule 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 the Debts Recovery Tribunal-1, Kolkata to recall the order dated 21.02.2024 passed in O.A. No. 2 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 learned Regulatory Authority upon hearing the learned authorised representative for the Respondent No.1 / Complainant and the learned Advocate for the Appellant Bank, by the impugned interim Order passed the following directions :

- "a) The Respondent Yes Bank Limited is hereby directed to stop all the proceedings including notice for auction scheduled to be held on 28th June, 2024 and / or on any future date with respect to the scheduled property i.e. Flat No. 21 C, Block - 'A' on 21st Floor of the subject matter project 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 Yes Bank Limited dated 16th March, 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 disposal of this matter or until further order, whichever is earlier.

- e) The Respondent Bank is also directed to take all necessary steps to vacate the physical possession of the flat being Flat No. 21 C, Block – 'A' on 21st Floor of the subject matter project and deliver it to the complainant within seven days from the date of receipt of this order of the Authority through e-Mail.
- f) The Complainant is directed to submit his total submission regarding his complaint petition on a Notarised 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 e-Mail.
- g) The Respondents are hereby directed to submit his written response on Notarised Affidavit regarding the complaint petition and affidavit of the complaint, 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 complaint either by post or by e-Mail, whichever is earlier."

A reading of the impugned Order passed by the learned Regulatory Authority shows that the learned Regulatory Authority placing reliance on a decision dated 24th December, 2021 passed by the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc. and the definition of Promoter under Section 2(zk) has observed that by virtue of Deed of Mortgage executed between the Promoter Ideal Real Estates Private Limited and Yes Bank Limited, the Bank became a Promoter as an assignee and all the obligations of a Promoter were cast upon the bank. The learned Regulatory Authority, by referring to the order dated 14th February, 2022 passed by the Hon'ble Apex Court in petition for Special Leave to Appeal (C) Nos. 1861-1871 /

2022 (Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc.) has observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as a secured creditors if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act. In the light of such legal proposition and considering the documents on record, the learned Regulatory Authority was satisfied that the Respondent No.1 / Complainant was able to establish a prima facie case to get an interim order and accordingly it passed the interim order as excerpted above in exercise of power under Section 36 of the Real Estate (Regulation and Development) Act, 2016.

It is contended by the Appellant Bank in the Memorandum of Appeal that on the representation made by the Promoter the Bank sanctioned a term loan to the tune of Rs. 320,00,00,000/- (Rupees three hundred twenty crore only) and FITL i.e. Funded Interest Term Loan to the tune of Rs.235,00,86,239.48 (Rupees two hundred thirty-five crore eighty-six thousand two hundred thirty-nine and paisa forty-eight only) for the purpose of financing of existing secured and unsecured debts along with part financing of the construction cost of the project 'Ideal Exotica'. The facilities extended by the Appellant Bank to the Respondent No.2 were, *inter alia*, secured by charge and mortgage over the unsold units of the project and other projects as detailed in loan and security documents. In that regard a registered Deed of Mortgage was entered into on June 10, 2019 between the Appellant Bank and the Promoter to create the said Mortgage and charge over the properties of the Promoter. By virtue of this Deed of Mortgage, the subject apartment being Flat No. 21 C, Block - 'A' on 21st Floor remained mortgaged and charged to secure the repayment of loan amount availed of by the Promoter. The Appellant Bank submits that since the Promoter failed to repay the loan amount, it approached the Debts Recovery Tribunal-1, Kolkata under the relevant provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) seeking reliefs so that it could recover the loan amount.

Mr. Sourjya Roy, learned Counsel appearing for the Appellant Bank submits that the Mortgage Deed was executed and registered on June 10, 2019 much prior to the Agreement for Sale or booking of the flat between the Respondent No.1 and Promoter. The mortgage / charge was created in respect of the project comprising the unsold flats therein only to secure the loan amount granted by the Bank to the Promoter. Learned Counsel submits that while the mortgage was created, the Promoter did not disclose or divulge that allotments or agreements for sale in respect of the flats were made between the Promoter and the intending purchasers, if any. Learned Counsel argues that since the borrower failed to repay the loan amount, his client rightly approached the Debts Recovery Tribunal under Section 13(4) of the SARFAESI Act to recover its secured debt. According to learned Counsel, since the mortgage took place much prior to the Agreement for Sale or the date of booking in respect of the subject apartment, the decision of the Hon'ble Rajasthan High Court in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors. and the order dated 14th February, 2022 of the Hon'ble Apex Court in the Petition for Special Leave to Appeal (C) Nos.1861-1871/2022 (Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors.) will not apply to the factual matrix as placed by the Respondent No.1. The mortgage, by which repayment of the debt was secured by the Promoter, will not denote the Bank as an assignee. Learned Counsel submits that the complaint filed by the Respondent No.1 is hit by the doctrine of 'Caveat Emptor' meaning 'let the buyer beware'. In such context, learned Counsel argues that in the setting of the facts as portrayed by his client, the provisions of the Real Estate (Regulation and Development) Act, 2016 would not apply to the instant matter.

Mr. Gopal Krishna Lodha, Chartered Accountant and authorised representative for the Respondent No.1 submits that the Promoter Ideal Real Estates Private Limited registered the project namely 'Ideal Exotica' with the West Bengal Housing Industry Regulatory Authority vide Registration No.HIRA/P/KOL/2018/000177. After registration of the project there were allotments of flats and Agreements for Sale between the Promoter and a number of Allottees in respect of the project. Mr. Lodha submits that since the Promoter

transferred the project by way of mortgage in favour of the Appellant Bank to secure the loan amount taken by it from the Bank, the Promoter ought to have obtained prior written consent from two-third allottees and prior written approval of the Regulatory Authority. By not doing so, the transfer by way of mortgage is hit by Section 15 of the Real Estate (Regulation and Development) Act. Mr. Lodha vehemently argues that the learned Regulatory Authority by placing reliance on the Judgment of the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India and the solemn order dated 14th February, 2022 of the Hon'ble Apex Court in the SLP(C) Nos. 1861-1871/2022, has rightly observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in the RERA Act would prevail and the Regulatory 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. The learned Regulatory Authority has also rightly observed that as an assignee the Appellant Bank has become the Promoter in respect of the flats of the project. On such score, Mr. Lodha submits that the interim Order as passed by the learned Regulatory Authority under Section 36 of the Act is sustainable in law and the appeal is liable to be dismissed.

Though the Promoter Ideal Real Estates Private Limited has been impleaded as a Respondent and it has represented itself before this Tribunal through a learned Advocate on some dates, but no pleading has been submitted on behalf of the Promoter. So, no written stand of the added Respondent No.2 Ideal Real Estates Private Limited is available before this Tribunal. However, an inkling of the stand of the Respondent No.2 surfaces from the principal Deed of Mortgage dated 10th June, 2019 executed and registered between Ideal Real Estates Private Limited and the Appellant Yes Bank Limited. By this instrument, the Promoter mortgaged 82 unsold flats as described in Schedule II of the Deed in favour of the Appellant Bank to secure the loan amount which the Promoter took from the Bank. Besides, there were 103 sold flats in the project as described in Schedule-III of the Deed. As it is evident, the unsold and sold flats as depicted in the schedules all stood on 31.05.2019. This manifests by implication that while the Deed of Mortgage was executed and

registered, there were allotment of flats in favour of a number of allottees and there were Agreements for Sale between the Promoter and the Allottees. But, in this Deed there is no indication of the registration of the project undertaken by the Promoter either with West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. However, the Deed of Conveyance between the Respondent No.1 M/s Laxmi Narain Metallic Private Limited and the Promoter Ideal Real Estates Private Limited executed and registered on 28th October, 2021 shows that the project of the Promoter was registered with the West Bengal Housing Industry Regulatory Authority on 21st November, 2018 under Registration No.HIRA/P/KOL/2018/000177 under the relevant provision of the West Bengal Housing Industry Regulation Act, 2017. In this regard, it is pertinent to mention that the West Bengal Housing Industry Regulation Act, 2017 has been struck down as ultra vires the Constitution by the Hon'ble Apex Court in a decision dated 4th May, 2021 in the case of Forum for People's Collective Efforts (FPCE) Vs State of West Bengal. However, the Hon'ble Apex Court in this decision has observed that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the Judgment. In an order dated 12.05.2023 passed in the Petition for Special Leave to Appeal (C) No.16908 / 2022 (Saptaparna Ray Vs. District Magistrate and Collector, North 24 Parganas and Others), the Hon'ble Apex Court has held that this principle shall also apply to orders which were passed whether in original or in the course of the execution prior to the date of Judgment on 04.05.2021. All such orders shall be executed in accordance with law, as if they were issued under the RERA. In such legal position, the registration of the project of the Promoter under the provisions of the West Bengal Housing Industry Regulation Act, 2017 will continue to be governed under the Real Estate (Regulation and Development) Act, 2016. Similarly, any act or omission between the Promoter and the Allottees will also be guided by the provisions of the Real Estate (Regulation and Development) Act, 2016.

As submitted on behalf of the Appellant, since the Mortgage Deed was executed between the Promoter and the Appellant Bank on 10th June, 2019 much prior to the execution and registration of the Agreement for Sale between the

Promoter and the Respondent No.1, the legal principles enunciated by the Hon'ble High Court of Judicature for Rajasthan and the Hon'ble Apex Court in the case of Union Bank of India that the Real Estate (Regulation and Development) Act, 2016 would prevail over SARFAESI, will not be applicable to the facts of the instant matter.

It is the assertion of the Respondent No.1 that before transferring the project by way of mortgage by the Promoter in favour of the Appellant Bank, the Promoter did not obtain prior written consent from two-third allottees and prior written approval of the Authority as required under Section 15 of the Act. As we find, there is no pleading on behalf of the added Respondent No.2 Ideal Real Estates Private Limited to deny such assertion of the Respondent No.1.

As stated above, the project was registered on 21st November, 2018 under the West Bengal Housing Industry Regulation Act, 2017 and the Deed of Mortgage was executed and registered on 10th June, 2019 i.e. after the registration of the project. As indicated in the Deed of Mortgage, at the time of mortgaging the project in favour of the Appellant Bank, the project had 82 unsold flats and 103 sold flats.

Learned Regulatory Authority by the impugned interim Order has noted that the Appellant Bank by virtue of the mortgage has been an Assignee of the Promoter and thereby the Yes Bank Limited will be treated as a Promoter as defined in Section 2(zk) of the Act. The Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority has held at paragraph 30 of the Judgment as under:

- "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 the RERA Act. The Advance Law Lexicon by P. Ramanatha Aiyar explains 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 express 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 become bankrupt”.

It is the contention of the Appellant that by virtue of the Deed of Mortgage a charge was created on the project comprising the unsold flats therein with the sole object to secure the loan taken by the Promoter from the Bank. According to learned Counsel for the Appellant, this mortgage or charge for the purpose of securing repayment of the loan amount cannot be termed as transfer.

As observed by the Hon'ble High Court of Judicature for Rajasthan, by virtue of the mortgage, the Appellant Bank has been an Assignee of the Promoter. In such context, it will be apposite to refer to Section 58 of the Transfer of Property Act, 1882. As Section 58 of the Transfer of Property Act enjoins, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future date, or the performance of an engagement which may give rise to a pecuniary liability. This implies that by virtue of the registered Deed of Mortgage, transfer to the extent as stated in Section 58 of the Transfer of Property Act, has been effected in respect of the project of the Promoter. The project was registered under the West Bengal Housing Industry Regulation Act, 2017 on 21st November, 2018. As held by the Hon'ble Apex Court in the case of Forum for Peoples Collective Efforts (FPCE) Vs. State of West Bengal reported in (2021)3 SCC 599 and in the case of Saptaparna Ray in SLP(C) 16908 / 2022, the aforesaid registration of the project and all other legal acts in connection with the project will be guided by the Real Estate (Regulation and Development) Act, 2016 (RERA Act). Section 4 of the RERA Act, *inter alia*, says that while the Promoter shall make application to the Regulatory Authority for registration of the real estate project, he shall furnish the sanction plan, layout plan and specification of the proposed project or the phase thereof and the whole project as sanctioned by the Competent Authority, proforma of the Allotment Letter, Agreement for Sale and the Conveyance Deeds proposed to be signed with the allottees. Since the project was registered in November 2018 prior to the Deed of Mortgage in June 2019, the Yes Bank Limited ought to have enquired of the details of the project as uploaded either on the website of the West Bengal

Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. It impliedly appears from the pleading of the Respondent No.1 that at the time of execution and registration of the Deed of Mortgage, there were number of allotments of flats and Agreements for Sale. Section 15 of the RERA Act regulates the transfer or assignment of the rights and liabilities of a Promoter in respect of a real estate project to a third party. Section 15 of the RERA Act, *inter alia*, reads as under :

“15. The Promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to the third party without obtaining prior written consent from two-third allottees except the Promoter and without the prior written approval of the Authority:

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be in the real estate project made by the erstwhile Promoter”.

As observed by the Hon'ble High Court of Judicature for Rajasthan in Union Bank of India and in view of discussion on Section 58 of the Transfer of Property Act, the Promoter transferred / assigned the project comprising the unsold flats to the Appellant Yes Bank Limited. No iota of documentary evidence has been adduced from the side of the Appellant Bank to show that the prior to transfer or assignment of the project in favour of the Bank, the Promoter obtained prior written consent from two-third allottees as well as the prior written approval of the West Bengal Housing Industry Regulatory Authority which had then legal entity. As a consequence thereof, the deed of mortgage shall not have any prejudicial effect upon the allottee or allottees or the buyers of the flats. Be that as it may, even if the transfer was effected lawfully, such transfer or assignment shall not affect the allotment or sale of the apartments as per the proviso to Section 15 of the RERA Act. In such connection, it will be profitable to refer to Section 11(h) of the RERA Act which provides that after the Promoter executes an Agreement for Sale for any apartment, not mortgage or create a charge on such apartment 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. All these legal provisions clearly demonstrate that transfer or assignment of a project by a

Promoter to a third party or any mortgage or charge in respect of any flat of the project, shall not, in any way, affect the rights of an allottee or a buyer of a flat. On the other hand, Insolvency and Bankruptcy Code, 2016 also protects the interests of an allottee from whom any amount is raised under a Real Estate Project. As per Section 5(8) of the Code as amended vide Amendment Act 26 of 2018 with effect from 06.06.2018, the amount invested by an allottee shall be termed as financial debt and such financial debt is recoverable by an allottee under the various remedial measures as provided in the Code. Therefore, viewed from any angle, the rights and interests of an allottee are protected by different statutes.

Admittedly, the Appellant Bank approached the Debts Recovery Tribunal-1, Kolkata by filing an application registered as O.A. No. 2 of 2024 under Section 13(4) of the SARFAESI Act seeking measures to recover its secured debt by taking possession of the secured assets of the borrower for realising the secured assets and the Debts Recovery Tribunal passed order as sought for by the Appellant Bank.

It is argued on behalf of the Appellant that if the Respondent No.1 became aggrieved by the order passed by the Debts Recovery Tribunal, it ought to have approached the same Debts Recovery Tribunal under Section 17 of the SARFAESI Act. Section 17(1) of the SARFAESI Act says that any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of the Section 13 taken by the secured creditor or his authorised 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 45 (forty-five) days from the date on which such measure had been taken.

The legal proposition as reflected above clearly demonstrates that despite any mortgage or charge created in respect of a project, the rights of an allottee shall remain unaffected. However, the Hon'ble Apex Court in disposing of the Special Leave to Appeal (C) Nos.1861-1871 of 2022 challenging the Judgment of the Hon'ble High Court of Judicature for Rajasthan passed in the Union Bank of India, by order dated 14th February, 2022, has held that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person

against the Bank as secured creditor if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act.

Therefore, in view of the above legal proposition, the learned Regulatory Authority was within legal domain to entertain the complaint of the Respondent No.1 challenging the order passed by the Debts Recovery Tribunal under Section 13(4) of SARFAESI Act.

As discussed on the provisions under Section 15 of the RERA Act, the transfer or assignment of the project by way of mortgage is hit by law sans permission from the two-third of the allottees and the WBHIRA or WBRERA. Even if it is assumed that this transfer or assignment is lawful in that event also, the Appellant Bank put into the shoes of the Promoter as an assignee or transferee shall be required to independently comply with all the pending obligations under the provisions of the RERA Act or the Rules and Regulations made thereunder and the pending obligations as per the Agreement for Sale entered into by the erstwhile Promoter with the allottees under Section 15(2) of the RERA Act.

Now, it is axiomatic, in view of the legal position as above, while the rights of an allottee or the flat buyer are protected under the provisions of the RERA Act, no question arises that an allottee or a flat buyer would approach the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act.

Therefore, we do not find any illegality or impropriety in the impugned interim Order as passed by the learned Regulatory Authority.

We find that the learned Regulatory Authority passed the interim Order in exercise of power under Section 36 of the RERA Act on urgent measure before exchange of affidavits between the parties. The learned Regulatory Authority, however, directed the parties to exchange their respective affidavits within a stipulated period. That being so, the learned Regulatory Authority shall have to dispose of the complaint after exchange of the affidavits between the parties and hearing the parties. In such view of the matter, we note herein that the interim Order passed by the learned Regulatory Authority shall be without prejudice to the rights and contentions of the parties.

We feel that for proper adjudication of the complaint, the learned Regulatory Authority may be directed to add the Promoter as a Respondent to the complaint.

In view of the above, the appeal is dismissed on contest. Consequently, the application for stay having no merit is also dismissed.

No order as to costs.

The interim Order passed by the learned Regulatory Authority is hereby affirmed and this order will continue till disposal of the complaint.

The learned Regulatory Authority is directed to add the Promoter Ideal Real Estates Private Limited as a Respondent to the complaint and serve notice upon it.

The added Respondent-Promoter shall be given opportunity to file affidavit to place its stand.

The learned Regulatory Authority shall dispose of the complaint as expeditiously as possible.

Let a copy of this Judgment be communicated to the respective parties through their learned Advocate and the authorised representative as well as the learned Regulatory Authority.

Sd/-
JUSTICE RABINDRANATH SAMANTA
Chairperson
West Bengal Real Estate Appellate Tribunal

Sd/-
GOUR SUNDAR BANERJEE
Judicial Member
West Bengal Real Estate Appellate Tribunal

Sd/-
Dr. SUBRAT MUKHERJEE
Technical/Administrative Member
West Bengal Real Estate Appellate Tribunal

By Order of WBREAT

Dated: 09.01.2025



Authorised Signatory

**IN THE WEST BENGAL REAL ESTATE APPELLATE TRIBUNAL
KOLKATA - 700 075**

- Present: 1. Justice Rabindranath Samanta
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2. Shri Gour Sundar Banerjee
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3. Dr. Subrat Mukherjee
Hon'ble Administrative Member

WBREAT/APPEAL NO. - 016/2024

Yes Bank Limited

..... Appellant

Stephen House, 56A, Hemanta Basu Sarani,
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Kolkata – 700 001.

- Vs -

1. Gitesh Tikmani

.....Respondent No.1

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Mr. Sourjya Roy, Advocate

For the Appellant

Mr. Gopal Krishna Lodha, Chartered Accountant and
authorised representative

For the Respondent No. 1

Heard on : **09.12.2024**

Judgment on : **09.01.2025**

Rabindranath Samanta, J:-

Aggrieved by an interim order dated 07.06.2024 passed by the learned West Bengal Real Estate Regulatory Authority (For Short 'Regulatory Authority') in Complaint No.WBRERA/COM000891, the Appellant Yes Bank Limited has approached this Tribunal by preferring this appeal.

The complaint registered as WBRERA/COM000891 was brought by the Respondent No.1 / Complainant **Gitesh Tikmani** against the Appellant Yes Bank Limited. The Promoter namely Ideal Real Estates Private Limited was not a party to the Complaint. However, during hearing of the appeal, this Tribunal thought it proper to add the Promoter Ideal Real Estates Private Limited as a necessary party to the appeal. Accordingly, the Promoter has been impleaded as Respondent No.2 in the appeal.

Though, after service of notice upon it, the Respondent No.2 appeared before this Tribunal through a learned Advocate, but it did not file any pleading to contest the appeal. On the previous dates of hearing of the appeal, a learned Advocate appeared for the Respondent No.2 before us, but she stopped participating in the final hearing of the appeal on 09.12.2024.

The Complainant / Respondent No. 1 Gitesh Tikmani filed the complaint with the learned Regulatory Authority on the facts which may be summarised as under :

On the representation made by the Promoter Ideal Real Estates Private Limited, the Respondent No.1 booked one residential apartment being Flat No.20C, Block-'A' on 20th Floor in a project namely 'Ideal Exotica' at Premises No. 21, Pramatha Chowdhury Sarani, New Alipore, Kolkata - 700 053, having a carpet area of 1566 sq.ft. (approximately) along with exclusive balcony / terrace measuring carpet area of 151 sq.ft. and having built-up area of 1869 sq.ft. and super built-up area of 2560 sq.ft. together with a covered car parking space and one upper basement car parking space. The Respondent No.1 Gitesh Tikmani along with his wife Manisha Tikmani by a registered Deed of Conveyance dated 17.11.2021, purchased the flat at the consideration of Rs.1,99,00,001/- (Rupees one crore ninety-nine lacs and one rupee only). When the Deed of Conveyance was executed on 17.11.2021, there was nothing in the records of the Regulatory Authority / WBHIRA that any alleged mortgage had been created. Since the execution and registration of the Deed of Conveyance the Respondent No.1 with his wife is in possession of the flat. The Respondent No.1 got the aforesaid flat mutated in his name with Kolkata Municipal Corporation vide Mutation Case No.0/081/25-MAY-23/147029 dated 25.05.2023 and he was allotted Assessee No.110812302528. He

has been paying the Corporation Tax as and when due. It is pertinent to mention that after purchase of the flat the Respondent No.1 became a member of the Flat Owners Association namely 'Ideal Exotica Owners Association'. After becoming a member of the Association the Respondent No.1 has been paying the maintenance charges in respect of the flat to the Association since the date when he got possession of the flat. While he was in peaceful occupation of the flat, he became shocked after seeing a public notice of symbolic possession of the flat published in a daily newspaper dated March 18, 2024.

This Respondent came to learn that the public notice of symbolic possession was issued pursuant to a direction passed by the Debts Recovery Tribunal-1, Kolkata, in O.A. No. 2 of 2024 on 21.02.2024. The Debts Recovery Tribunal passed the order in the aforesaid proceeding brought by the Appellant Yes Bank Limited against the Promoter. The Promoter Ideal Real Estates Private Limited took loan from the Bank and since the Bank failed to repay the loan, the Bank declared the accounts of the Promoter as Non-Performing Asset (NPA) and subsequently approached the Debts Recovery Tribunal for taking possession of the apartment belonging to the Respondent No.1. As a bonafide purchaser of the flat the Respondent No.1 was surprised with the aforesaid proceeding brought by the Bank for taking symbolic possession of his flat. The Respondent No.1 submits that before the mortgage was created in favour of the Appellant, there were already allotments and/or Agreements for Sale in respect of the flats of the project. This Respondent contends that without permission from the allottees, the purported mortgage could not have been entered into and as such the mortgage has now become ineffective. Since the Appellant Bank was in every mood to take physical possession of the flat and to sell it by auction in compliance with the order passed by the Debts Recovery Tribunal, the Respondent No.1 / Complainant by bringing the complaint before the learned Regulatory Authority sought for the following reliefs :

- "1) To direct the Yes Bank Limited to stop all proceedings with respect to the schedule 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 the Debts 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 learned Regulatory Authority upon hearing the learned authorised representative for the Respondent No.1 / Complainant and the learned Advocate for the Appellant Bank, by the impugned interim Order passed the following directions :

- “a) The Respondent Yes Bank Limited is hereby directed to stop all the proceedings including notice for auction scheduled to be held on 28th June, 2024 and / or on any future date with respect to the scheduled property i.e. Flat No.20C, Block – ‘A’ on 20th Floor of the subject matter project 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 Yes Bank Limited dated 16th March, 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 disposal of this matter or until further order, whichever is earlier.
- e) The Respondent Bank is also directed to take all necessary steps to vacate the physical possession of the flat being Flat No.20C, Block – ‘A’

on 20th Floor of the subject matter project and deliver it to the complainant within seven days from the date of receipt of this order of the Authority through e-Mail.

- f) The Complainant is directed to submit his total submission regarding his complaint petition on a Notarised 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 e-Mail.
- g) The Respondents are hereby directed to submit his written response on Notarised Affidavit regarding the complaint petition and affidavit of the complaint, 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 complaint either by post or by e-Mail, whichever is earlier."

A reading of the impugned Order passed by the learned Regulatory Authority shows that the learned Regulatory Authority placing reliance on a decision dated 24th December, 2021 passed by the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc. and the definition of Promoter under Section 2(zk) has observed that by virtue of Deed of Mortgage executed between the Promoter Ideal Real Estates Private Limited and Yes Bank Limited, the Bank became a Promoter as an assignee and all the obligations of a Promoter were cast upon the bank. The learned Regulatory Authority, by referring to the order dated 14th February, 2022 passed by the Hon'ble Apex Court in petition for Special Leave to Appeal (C) Nos. 1861-1871 / 2022 (Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc.) has observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as a

secured creditors if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act. In the light of such legal proposition and considering the documents on record, the learned Regulatory Authority was satisfied that the Respondent No.1 / Complainant was able to establish a prima facie case to get an interim order and accordingly it passed the interim order as excerpted above in exercise of power under Section 36 of the Real Estate (Regulation and Development) Act, 2016.

It is contended by the Appellant Bank in the Memorandum of Appeal that on the representation made by the Promoter the Bank sanctioned a term loan to the tune of Rs.320,00,00,000/- (Rupees three hundred twenty crore only) and FITL i.e. Funded Interest Term Loan to the tune of Rs.235,00,86,239.48 (Rupees two hundred thirty-five crore eighty-six thousand two hundred thirty-nine and paisa forty-eight only) for the purpose of financing of existing secured and unsecured debts along with part financing of the construction cost of the project 'Ideal Exotica'. The facilities extended by the Appellant Bank to the Respondent No.2 were, *inter alia*, secured by charge and mortgage over the unsold units of the project and other projects as detailed in loan and security documents. In that regard a registered Deed of Mortgage was entered into on June 10, 2019 between the Appellant Bank and the Promoter to create the said Mortgage and charge over the properties of the Promoter. By virtue of this Deed of Mortgage, the subject apartment being 20C in Block-'A' remained mortgaged and charged to secure the repayment of loan amount availed of by the Promoter. The Appellant Bank submits that since the Promoter failed to repay the loan amount, it approached the Debts Recovery Tribunal-1, Kolkata under the relevant provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) seeking reliefs so that it could recover the loan amount.

Mr. Sourjya Roy, learned Counsel appearing for the Appellant Bank submits that the Mortgage Deed was executed and registered on June 10, 2019 much prior to the Agreement for Sale or booking of the flat between the Respondent No.1 and Promoter. The mortgage / charge was created in respect of the project comprising the unsold flats therein only to secure the loan amount granted by the Bank to the

Promoter. Learned Counsel submits that while the mortgage was created, the Promoter did not disclose or divulge that allotments or agreements for sale in respect of the flats were made between the Promoter and the intending purchasers, if any. Learned Counsel argues that since the borrower failed to repay the loan amount, his client rightly approached the Debts Recovery Tribunal under Section 13(4) of the SARFAESI Act to recover its secured debt. According to learned Counsel, since the mortgage took place much prior to the Agreement for Sale or the date of booking in respect of the subject apartment, the decision of the Hon'ble Rajasthan High Court in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors. and the order dated 14th February, 2022 of the Hon'ble Apex Court in the Petition for Special Leave to Appeal (C) Nos.1861-1871/2022 (Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors.) will not apply to the factual matrix as placed by the Respondent No.1. The mortgage, by which repayment of the debt was secured by the Promoter, will not denote the Bank as an assignee. Learned Counsel submits that the complaint filed by the Respondent No.1 is hit by the doctrine of 'Caveat Emptor' meaning 'let the buyer beware'. In such context, learned Counsel argues that in the setting of the facts as portrayed by his client, the provisions of the Real Estate (Regulation and Development) Act, 2016 would not apply to the instant matter.

Mr. Gopal Krishna Lodha, Chartered Accountant and authorised representative for the Respondent No.1 submits that the Promoter Ideal Real Estates Private Limited registered the project namely 'Ideal Exotica' with the West Bengal Housing Industry Regulatory Authority vide Registration No.HIRA/P/KOL/2018/000177. After registration of the project there were allotments of flats and Agreements for Sale between the Promoter and a number of Allottees in respect of the project. Mr. Lodha submits that since the Promoter transferred the project by way of mortgage in favour of the Appellant Bank to secure the loan amount taken by it from the Bank, the Promoter ought to have obtained prior written consent from two-third allottees and prior written approval of the Regulatory Authority. By not doing so, the transfer by way of mortgage is hit by Section 15 of the Real Estate (Regulation and Development) Act. Mr. Lodha

vehemently argues that the learned Regulatory Authority by placing reliance on the Judgment of the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India and the solemn order dated 14th February, 2022 of the Hon'ble Apex Court in the SLP(C) Nos. 1861-1871/2022, has rightly observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in the RERA Act would prevail and the Regulatory 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. The learned Regulatory Authority has also rightly observed that as an assignee the Appellant Bank has become the Promoter in respect of the flats of the project. On such score, Mr. Lodha submits that the interim Order as passed by the learned Regulatory Authority under Section 36 of the Act is sustainable in law and the appeal is liable to be dismissed.

Though the Promoter Ideal Real Estates Private Limited has been impleaded as a Respondent and it has represented itself before this Tribunal through a learned Advocate on some dates, but no pleading has been submitted on behalf of the Promoter. So, no written stand of the added Respondent No.2 Ideal Real Estates Private Limited is available before this Tribunal. However, an inkling of the stand of the Respondent No.2 surfaces from the principal Deed of Mortgage dated 10th June, 2019 executed and registered between Ideal Real Estates Private Limited and the Appellant Yes Bank Limited. By this instrument, the Promoter mortgaged 82 unsold flats as described in Schedule II of the Deed in favour of the Appellant Bank to secure the loan amount which the Promoter took from the Bank. Besides, there were 103 sold flats in the project as described in Schedule-III of the Deed. As it is evident, the unsold and sold flats as depicted in the schedules all stood on 31.05.2019. This manifests by implication that while the Deed of Mortgage was executed and registered, there were allotment of flats in favour of a number of allottees and there were Agreements for Sale between the Promoter and the Allottees. But, in this Deed there is no indication of the registration of the project undertaken by the Promoter either with West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. However, the Deed of Conveyance between the

Respondent No.1 Gitesh Tikmani and the Promoter Ideal Real Estates Private Limited executed and registered on 29th May, 2023 shows that the project of the Promoter was registered with the West Bengal Housing Industry Regulatory Authority on 21st November, 2018 under Registration No.HIRA/P/KOL/2018/000177 under the relevant provision of the West Bengal Housing Industry Regulation Act, 2017. In this regard, it is pertinent to mention that the West Bengal Housing Industry Regulation Act, 2017 has been struck down as ultra vires the Constitution by the Hon'ble Apex Court in a decision dated 4th May, 2021 in the case of Forum for People's Collective Efforts (FPCE) Vs State of West Bengal. However, the Hon'ble Apex Court in this decision has observed that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the Judgment. In an order dated 12.05.2023 passed in the Petition for Special Leave to Appeal (C) No.16908 / 2022 (Saptaparna Ray Vs. District Magistrate and Collector, North 24 Parganas and Others), the Hon'ble Apex Court has held that this principle shall also apply to orders which were passed whether in original or in the course of the execution prior to the date of Judgment on 04.05.2021. All such orders shall be executed in accordance with law, as if they were issued under the RERA. In such legal position, the registration of the project of the Promoter under the provisions of the West Bengal Housing Industry Regulation Act, 2017 will continue to be governed under the Real Estate (Regulation and Development) Act, 2016. Similarly, any act or omission between the Promoter and the Allottees will also be guided by the provisions of the Real Estate (Regulation and Development) Act, 2016.

As submitted on behalf of the Appellant, since the Mortgage Deed was executed between the Promoter and the Appellant Bank on 10th June, 2019 much prior to the execution and registration of the Agreement for Sale between the Promoter and the Respondent No.1, the legal principles enunciated by the Hon'ble High Court of Judicature for Rajasthan and the Hon'ble Apex Court in the case of Union Bank of India that the Real Estate (Regulation and Development) Act, 2016 would prevail over SARFAESI, will not be applicable to the facts of the instant matter.

It is the assertion of the Respondent No.1 that before transferring the project by way of mortgage by the Promoter in favour of the Appellant Bank, the Promoter did not obtain prior written consent from two-third allottees and prior written approval of the Authority as required under Section 15 of the Act. As we find, there is no pleading on behalf of the added Respondent No.2 Ideal Real Estates Private Limited to deny such assertion of the Respondent No.1.

As stated above, the project was registered on 21st November, 2018 under the West Bengal Housing Industry Regulation Act, 2017 and the Deed of Mortgage was executed and registered on 10th June, 2019 i.e. after the registration of the project. As indicated in the Deed of Mortgage, at the time of mortgaging the project in favour of the Appellant Bank, the project had 82 unsold flats and 103 sold flats.

Learned Regulatory Authority by the impugned interim Order has noted that the Appellant Bank by virtue of the mortgage has been an Assignee of the Promoter and thereby the Yes Bank Limited will be treated as a Promoter as defined in Section 2(zk) of the Act. The Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority has held at paragraph 30 of the Judgment as under:

"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 the RERA Act. The Advance Law Lexicon by P. Ramanatha Aiyar explains 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 express 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 become bankrupt".

It is the contention of the Appellant that by virtue of the Deed of Mortgage a charge was created on the project comprising the unsold flats therein with the sole object to secure the loan taken by the Promoter from the Bank. According to learned

Counsel for the Appellant, this mortgage or charge for the purpose of securing repayment of the loan amount cannot be termed as transfer.

As observed by the Hon'ble High Court of Judicature for Rajasthan, by virtue of the mortgage, the Appellant Bank has been an Assignee of the Promoter. In such context, it will be apposite to refer to Section 58 of the Transfer of Property Act, 1882. As Section 58 of the Transfer of Property Act enjoins, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future date, or the performance of an engagement which may give rise to a pecuniary liability. This implies that by virtue of the registered Deed of Mortgage, transfer to the extent as stated in Section 58 of the Transfer of Property Act, has been effected in respect of the project of the Promoter. The project was registered under the West Bengal Housing Industry Regulation Act, 2017 on 21st November, 2018. As held by the Hon'ble Apex Court in the case of Forum for Peoples Collective Efforts (FPCE) Vs. State of West Bengal reported in (2021)3 SCC 599 and in the case of Saptaparna Ray in SLP(C) 16908 / 2022, the aforesaid registration of the project and all other legal acts in connection with the project will be guided by the Real Estate (Regulation and Development) Act, 2016 (RERA Act). Section 4 of the RERA Act, *inter alia*, says that while the Promoter shall make application to the Regulatory Authority for registration of the real estate project, he shall furnish the sanction plan, layout plan and specification of the proposed project or the phase thereof and the whole project as sanctioned by the Competent Authority, proforma of the Allotment Letter, Agreement for Sale and the Conveyance Deeds proposed to be signed with the allottees. Since the project was registered in November 2018 prior to the Deed of Mortgage in June 2019, the Yes Bank Limited ought to have enquired of the details of the project as uploaded either on the website of the West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. It impliedly appears from the pleading of the Respondent No.1 that at the time of execution and registration of the Deed of Mortgage, there were number of allotments of flats and Agreements for Sale. Section 15 of the RERA Act regulates the

transfer or assignment of the rights and liabilities of a Promoter in respect of a real estate project to a third party. Section 15 of the RERA Act, *inter alia*, reads as under :

“15. The Promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to the third party without obtaining prior written consent from two-third allottees except the Promoter and without the prior written approval of the Authority:

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be in the real estate project made by the erstwhile Promoter”.

As observed by the Hon'ble High Court of Judicature for Rajasthan in Union Bank of India and in view of discussion on Section 58 of the Transfer of Property Act, the Promoter transferred / assigned the project comprising the unsold flats to the Appellant Yes Bank Limited. No iota of documentary evidence has been adduced from the side of the Appellant Bank to show that the prior to transfer or assignment of the project in favour of the Bank, the Promoter obtained prior written consent from two-third allottees as well as the prior written approval of the West Bengal Housing Industry Regulatory Authority which had then legal entity. As a consequence thereof, the deed of mortgage shall not have any prejudicial effect upon the allottee or allottees or the buyers of the flats. Be that as it may, even if the transfer was effected lawfully, such transfer or assignment shall not affect the allotment or sale of the apartments as per the proviso to Section 15 of the RERA Act. In such connection, it will be profitable to refer to Section 11(h) of the RERA Act which provides that after the Promoter executes an Agreement for Sale for any apartment, not mortgage or create a charge on such apartment 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. All these legal provisions clearly demonstrate that transfer or assignment of a project by a Promoter to a third party or any mortgage or charge in respect of any flat of the project, shall not, in any way, affect the rights of an allottee or a buyer of a flat. On the other hand, Insolvency and Bankruptcy Code, 2016 also protects the interests of an allottee from whom any amount is raised under a Real Estate Project. As per

Section 5(8) of the Code as amended vide Amendment Act 26 of 2018 with effect from 06.06.2018, the amount invested by an allottee shall be termed as financial debt and such financial debt is recoverable by an allottee under the various remedial measures as provided in the Code. Therefore, viewed from any angle, the rights and interests of an allottee are protected by different statutes.

Admittedly, the Appellant Bank approached the Debts Recovery Tribunal-1, Kolkata by filing an application registered as O.A. No. 2 of 2024 under Section 13(4) of the SARFAESI Act seeking measures to recover its secured debt by taking possession of the secured assets of the borrower for realising the secured assets and the Debts Recovery Tribunal passed order as sought for by the Appellant Bank.

It is argued on behalf of the Appellant that if the Respondent No.1 became aggrieved by the order passed by the Debts Recovery Tribunal, it ought to have approached the same Debts Recovery Tribunal under Section 17 of the SARFAESI Act. Section 17(1) of the SARFAESI Act says that any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of the Section 13 taken by the secured creditor or his authorised 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 45 (forty-five) days from the date on which such measure had been taken.

The legal proposition as reflected above clearly demonstrates that despite any mortgage or charge created in respect of a project, the rights of an allottee shall remain unaffected. However, the Hon'ble Apex Court in disposing of the Special Leave to Appeal (C) Nos.1861-1871 of 2022 challenging the Judgment of the Hon'ble High Court of Judicature for Rajasthan passed in the Union Bank of India, by order dated 14th February, 2022, has held that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as secured creditor if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act.

Therefore, in view of the above legal proposition, the learned Regulatory Authority was within legal domain to entertain the complaint of the Respondent

No.1 challenging the order passed by the Debts Recovery Tribunal under Section 13(4) of SARFAESI Act.

As discussed on the provisions under Section 15 of the RERA Act, the transfer or assignment of the project by way of mortgage is hit by law sans permission from the two-third of the allottees and the WBHIRA or WBRERA. Even if it is assumed that this transfer or assignment is lawful in that event also, the Appellant Bank put into the shoes of the Promoter as an assignee or transferee shall be required to independently comply with all the pending obligations under the provisions of the RERA Act or the Rules and Regulations made thereunder and the pending obligations as per the Agreement for Sale entered into by the erstwhile Promoter with the allottees under Section 15(2) of the RERA Act.

Now, it is axiomatic, in view of the legal position as above, while the rights of an allottee or the flat buyer are protected under the provisions of the RERA Act, no question arises that an allottee or a flat buyer would approach the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act.

Therefore, we do not find any illegality or impropriety in the impugned interim Order as passed by the learned Regulatory Authority.

We find that the learned Regulatory Authority passed the interim Order in exercise of power under Section 36 of the RERA Act on urgent measure before exchange of affidavits between the parties. The learned Regulatory Authority, however, directed the parties to exchange their respective affidavits within a stipulated period. That being so, the learned Regulatory Authority shall have to dispose of the complaint after exchange of the affidavits between the parties and hearing the parties. In such view of the matter, we note herein that the interim Order passed by the learned Regulatory Authority shall be without prejudice to the rights and contentions of the parties.

We feel that for proper adjudication of the complaint, the learned Regulatory Authority may be directed to add the Promoter as a Respondent to the complaint.

In view of the above, the appeal is dismissed on contest. Consequently, the application for stay having no merit is also dismissed.

No order as to costs.

The interim Order passed by the learned Regulatory Authority is hereby affirmed and this order will continue till disposal of the complaint.

The learned Regulatory Authority is directed to add the Promoter Ideal Real Estates Private Limited as a Respondent to the complaint and serve notice upon it.

The added Respondent-Promoter shall be given opportunity to file affidavit to place its stand.

The learned Regulatory Authority shall dispose of the complaint as expeditiously as possible.

Let a copy of this Judgment be communicated to the respective parties through their learned Advocate and the authorised representative as well as the learned Regulatory Authority.

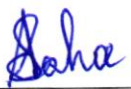
Sd/-
JUSTICE RABINDRANATH SAMANTA
Chairperson
West Bengal Real Estate Appellate Tribunal

Sd/-
GOUR SUNDAR BANERJEE
Judicial Member
West Bengal Real Estate Appellate Tribunal

Sd/-
Dr. SUBRAT MUKHERJEE
Technical/Administrative Member
West Bengal Real Estate Appellate Tribunal

By Order of WBREAT

Dated: 09.01.2025



Authorised Signatory

**IN THE WEST BENGAL REAL ESTATE APPELLATE TRIBUNAL
KOLKATA - 700 075**

Present: 1. Justice Rabindranath Samanta
Hon'ble Chairperson

2. Shri Gour Sundar Banerjee
Hon'ble Judicial Member

3. Dr. Subrat Mukherjee
Hon'ble Administrative Member

WBREAT/APPEAL NO. - 017/2024

Yes Bank Limited

Stephen House, 56A, Hemanta Basu Sarani,
Ground and Mezzanine Floor,
Kolkata - 700 001.

..... Appellant

- Vs -

1. Subh Properties Private Limited

Flat No. 14 B, Block-A, 14th Floor,
Ideal Exotica,
21, Pramatha Chowdhury Sarani,
New Alipore, Kolkata - 700053.

.....Respondent No.1

2. Ideal Real Estates Private Limited

50, Jawaharlal Nehru Road, Post Office - Little Russel Street,
Police Station - Shakespeare Sarani, Kolkata - 700 071.

.....Respondent No.2

Mr. Sourjya Roy, Advocate

For the Appellant

Mr. Gopal Krishna Lodha, Chartered Accountant and
authorised representative

For the Respondent No. 1

Heard on : **09.12.2024**

Judgment on : **09.01.2025**

Rabindranath Samanta, J:-

Aggrieved by an interim order dated 07.06.2024 passed by the learned West Bengal Real Estate Regulatory Authority (For Short 'Regulatory Authority') in Complaint No. WBRERA/COM000892, the Appellant Yes Bank Limited has approached this Tribunal by preferring this appeal.

The complaint registered as WBRERA/COM000892 was brought by the Respondent No. 1 / Complainant Subh Properties Private Limited against the Appellant Yes Bank Limited. The Promoter namely Ideal Real Estates Private Limited was not a party to the Complaint. However, during hearing of the appeal, this Tribunal thought it proper to add the Promoter Ideal Real Estates Private Limited as a necessary party to the appeal. Accordingly, the Promoter has been impleaded as Respondent No.2 in the appeal.

Though, after service of notice upon it, the Respondent No.2 appeared before this Tribunal through a learned Advocate, but it did not file any pleading to contest the appeal. On the previous dates of hearing of the appeal, a learned Advocate appeared for the Respondent No.2 before us, but she stopped participating in the final hearing of the appeal on 09.12.2024.

The Complainant / Respondent No. 1 Subh Properties Private Limited filed the complaint with the learned Regulatory Authority on the facts which may be summarised as under:

On the representation made by the Promoter Ideal Real Estates Private Limited, the Respondent No.1 booked one residential apartment being Flat No. 14B, Block-'A' on 14th Floor in a project namely 'Ideal Exotica' at Premises No. 21, Pramatha Chowdhury Sarani, New Alipore, Kolkata - 700 053, having a carpet area of 1526 Sq. feet (approximately) along with exclusive balcony / terrace / garden measuring carpet area of 170 Sq. feet and having built-up area of 1854 Sq. feet and super built-up area of 2540 Sq. feet together with two covered car parking spaces. The Respondent No.1, entered into an agreement for sale with the Promoter on 28th December, 2021 for purchasing the aforesaid flat at the consideration of Rs.2,33,94,000/- (Rupees two crore thirty three lacs ninety four thousand only). While the Respondent No.1 entered into the agreement on 28/12/2021 there was nothing in the records of the learned Regulatory Authority / WBHRA that any mortgage had been created. The Respondent No.1, thereafter, got peaceful vacant possession of the flat and since the date of execution of the Agreement for Sale. The Respondent No.1 paid the entire consideration amount to the Respondent No.2 and in turn, the Respondent No.2 executed and registered a Deed of Conveyance on

16th July, 2022 in respect of the flat in favour of the Respondent No.1. Thereafter, this Respondent got the aforesaid flat mutated in its name with Kolkata Municipal Corporation vide Mutation Case No.0/081/08-JUL-22/137920 dated 08th July, 2022 and was allotted assessee no.110812302292. It has been paying the corporation tax as and when due. It is pertinent to mention that after purchase of the flat the Respondent No.1 became a member of the Flat Owners Association namely 'Ideal Exotica Flat Owners Association'. After becoming a member of the Association the Respondent No.1 has been paying the maintenance charges in respect of the flat to the Association since the date when it got possession of the flat. While it was in peaceful occupation of the flat, it became shocked after seeing a public notice of symbolic possession of the flat published in a daily newspaper dated March 18, 2024.

This Respondent came to learn that the public notice of symbolic possession was issued pursuant to a direction passed by the Debts Recovery Tribunal-1, Kolkata, in O.A. No.2 of 2024 on 21.02.2024. The Debts Recovery Tribunal passed the order in the aforesaid proceeding brought by the Appellant Yes Bank Limited against the Promoter. The Promoter Ideal Real Estates Private Limited took loan from the Bank and since the Bank failed to repay the loan, the Bank declared the accounts of the Promoter as Non-Performing Asset (NPA) and subsequently approached the Debts Recovery Tribunal for taking possession of the apartment belonging to the Respondent No.1. As a bonafide purchaser of the flat the Respondent No.1 was surprised with the aforesaid proceeding brought by the Bank for taking symbolic possession of its flat. The Respondent No.1 submits that before the mortgage was created in favour of the Appellant, there were already allotments and/or Agreements for Sale in respect of the flats of the project. This Respondent contends that without permission from the allottees, the purported mortgage could not have been entered into and as such the mortgage has now become ineffective. Since the Appellant Bank was in every mood to take physical possession of the flat and to sell it by auction in compliance with the order passed by the Debts Recovery Tribunal, the Respondent No.1 / Complainant by bringing the complaint before the learned Regulatory Authority sought for the following reliefs :

- "1) To direct the Yes Bank Limited to stop all proceedings with respect to the schedule 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 the Debts Recovery Tribunal-1, Kolkata to recall the order dated 21.02.2024 passed in O.A. No. 2 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 learned Regulatory Authority upon hearing the learned authorised representative for the Respondent No.1 / Complainant and the learned Advocate for the Appellant Bank, by the impugned interim Order passed the following directions :

- "a) The Respondent Yes Bank Limited is hereby directed to stop all the proceedings including notice for auction scheduled to be held on 28th June, 2024 and / or on any future date with respect to the scheduled property i.e. Flat No. 14B, Block – 'A' on 14th Floor of the subject matter project 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 Yes Bank Limited dated 16th March, 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 disposal of this matter or until further order, whichever is earlier.
- e) The Respondent Bank is also directed to take all necessary steps to vacate the physical possession of the flat being Flat No. 14B, Block – 'A' on 14th Floor of the subject matter project and deliver it to the complainant within seven days from the date of receipt of this order of the Authority through e-Mail.
- f) The Complainant is directed to submit his total submission regarding his complaint petition on a Notarised 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 e-Mail.
- g) The Respondents are hereby directed to submit his written response on Notarised Affidavit regarding the complaint petition and affidavit of the complaint, 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 complaint either by post or by e-Mail, whichever is earlier."

A reading of the impugned Order passed by the learned Regulatory Authority shows that the learned Regulatory Authority placing reliance on a decision dated 24th December, 2021 passed by the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc. and the definition of Promoter under Section 2(zk) has observed that by virtue of Deed of Mortgage executed between the Promoter Ideal Real Estates Private Limited and Yes Bank Limited, the Bank became a Promoter as an assignee and all the obligations of a Promoter were cast upon the bank. The learned

Regulatory Authority, by referring to the order dated 14th February, 2022 passed by the Hon'ble Apex Court in petition for Special Leave to Appeal (C) Nos. 1861-1871 / 2022 (Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc.) has observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as a secured creditors if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act. In the light of such legal proposition and considering the documents on record, the learned Regulatory Authority was satisfied that the Respondent No.1 / Complainant was able to establish a prima facie case to get an interim order and accordingly it passed the interim order as excerpted above in exercise of power under Section 36 of the Real Estate (Regulation and Development) Act, 2016.

It is contended by the Appellant Bank in the Memorandum of Appeal that on the representation made by the Promoter the Bank sanctioned a term loan to the tune of Rs. 320,00,00,000/- (Rupees three hundred twenty crore only) and FITL i.e. Funded Interest Term Loan to the tune of Rs.235,00,86,239.48 (Rupees two hundred thirty-five crore eighty-six thousand two hundred thirty-nine and paisa forty-eight only) for the purpose of financing of existing secured and unsecured debts along with part financing of the construction cost of the project 'Ideal Exotica'. The facilities extended by the Appellant Bank to the Respondent No.2 were, *inter alia*, secured by charge and mortgage over the unsold units of the project and other projects as detailed in loan and security documents. In that regard a registered Deed of Mortgage was entered into on June 10, 2019 between the Appellant Bank and the Promoter to create the said Mortgage and charge over the properties of the Promoter. By virtue of this Deed of Mortgage, the subject apartment being 14B in Block-'A' remained mortgaged and charged to secure the repayment of loan amount availed of by the Promoter. The Appellant Bank submits that since the Promoter failed to repay the loan amount, it approached the Debts Recovery Tribunal-1, Kolkata under the relevant provisions of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) seeking reliefs so that it could recover the loan amount.

Mr. Sourjya Roy, learned Counsel appearing for the Appellant Bank submits that the Mortgage Deed was executed and registered on June 10, 2019 much prior to the Agreement for Sale or booking of the flat between the Respondent No. 1 and Promoter. The mortgage / charge was created in respect of the project comprising the unsold flats therein only to secure the loan amount granted by the Bank to the Promoter. Learned Counsel submits that while the mortgage was created, the Promoter did not disclose or divulge that allotments or agreements for sale in respect of the flats were made between the Promoter and the intending purchasers, if any. Learned Counsel argues that since the borrower failed to repay the loan amount, his client rightly approached the Debts Recovery Tribunal under Section 13(4) of the SARFAESI Act to recover its secured debt. According to learned Counsel, since the mortgage took place much prior to the Agreement for Sale or the date of booking in respect of the subject apartment, the decision of the Hon'ble Rajasthan High Court in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors. and the order dated 14th February, 2022 of the Hon'ble Apex Court in the Petition for Special Leave to Appeal (C) Nos.1861-1871/2022 (Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors.) will not apply to the factual matrix as placed by the Respondent No.1. The mortgage, by which repayment of the debt was secured by the Promoter, will not denote the Bank as an assignee. Learned Counsel submits that the complaint filed by the Respondent No.1 is hit by the doctrine of 'Caveat Emptor' meaning 'let the buyer beware'. In such context, learned Counsel argues that in the setting of the facts as portrayed by his client, the provisions of the Real Estate (Regulation and Development) Act, 2016 would not apply to the instant matter.

Mr. Gopal Krishna Lodha, Chartered Accountant and authorised representative for the Respondent No.1 submits that the Promoter Ideal Real Estates Private Limited registered the project namely 'Ideal Exotica' with the West Bengal Housing Industry Regulatory Authority vide Registration No.HIRA/P/KOL/2018/000177. After registration of the project there were

allotments of flats and Agreements for Sale between the Promoter and a number of Allottees in respect of the project. Mr. Lodha submits that since the Promoter transferred the project by way of mortgage in favour of the Appellant Bank to secure the loan amount taken by it from the Bank, the Promoter ought to have obtained prior written consent from two-third allottees and prior written approval of the Regulatory Authority. By not doing so, the transfer by way of mortgage is hit by Section 15 of the Real Estate (Regulation and Development) Act. Mr. Lodha vehemently argues that the learned Regulatory Authority by placing reliance on the Judgment of the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India and the solemn order dated 14th February, 2022 of the Hon'ble Apex Court in the SLP(C) Nos. 1861-1871/2022, has rightly observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in the RERA Act would prevail and the Regulatory 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. The learned Regulatory Authority has also rightly observed that as an assignee the Appellant Bank has become the Promoter in respect of the flats of the project. On such score, Mr. Lodha submits that the interim Order as passed by the learned Regulatory Authority under Section 36 of the Act is sustainable in law and the appeal is liable to be dismissed.

Though the Promoter Ideal Real Estates Private Limited has been impleaded as a Respondent and it has represented itself before this Tribunal through a learned Advocate on some dates, but no pleading has been submitted on behalf of the Promoter. So, no written stand of the added Respondent No.2 Ideal Real Estates Private Limited is available before this Tribunal. However, an inkling of the stand of the Respondent No.2 surfaces from the principal Deed of Mortgage dated 10th June, 2019 executed and registered between Ideal Real Estates Private Limited and the Appellant Yes Bank Limited. By this instrument, the Promoter mortgaged 82 unsold flats as described in Schedule II of the Deed in favour of the Appellant Bank to secure the loan amount which the Promoter took from the Bank. Besides, there were 103 sold flats in the project as described in Schedule-III of the Deed. As it is evident,

the unsold and sold flats as depicted in the schedules all stood on 31.05.2019. This manifests by implication that while the Deed of Mortgage was executed and registered, there were allotment of flats in favour of a number of allottees and there were Agreements for Sale between the Promoter and the Allottees. But, in this Deed there is no indication of the registration of the project undertaken by the Promoter either with West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. However, the Deed of Conveyance between the Respondent No.1 Subh Properties Private Limited and the Promoter Ideal Real Estates Private Limited executed and registered on 28th October, 2021 shows that the project of the Promoter was registered with the West Bengal Housing Industry Regulatory Authority on 21st November, 2018 under Registration No.HIRA/P/KOL/2018/000177 under the relevant provision of the West Bengal Housing Industry Regulation Act, 2017. In this regard, it is pertinent to mention that the West Bengal Housing Industry Regulation Act, 2017 has been struck down as ultra vires the Constitution by the Hon'ble Apex Court in a decision dated 4th May, 2021 in the case of Forum for People's Collective Efforts (FPCE) Vs State of West Bengal. However, the Hon'ble Apex Court in this decision has observed that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the Judgment. In an order dated 12.05.2023 passed in the Petition for Special Leave to Appeal (C) No.16908 / 2022 (Saptaparna Ray Vs. District Magistrate and Collector, North 24 Parganas and Others), the Hon'ble Apex Court has held that this principle shall also apply to orders which were passed whether in original or in the course of the execution prior to the date of Judgment on 04.05.2021. All such orders shall be executed in accordance with law, as if they were issued under the RERA. In such legal position, the registration of the project of the Promoter under the provisions of the West Bengal Housing Industry Regulation Act, 2017 will continue to be governed under the Real Estate (Regulation and Development) Act, 2016. Similarly, any act or omission between the Promoter and the Allottees will also be guided by the provisions of the Real Estate (Regulation and Development) Act, 2016.

As submitted on behalf of the Appellant, since the Mortgage Deed was executed between the Promoter and the Appellant Bank on 10th June, 2019 much prior to the execution and registration of the Agreement for Sale between the Promoter and the Respondent No.1, the legal principles enunciated by the Hon'ble High Court of Judicature for Rajasthan and the Hon'ble Apex Court in the case of Union Bank of India that the Real Estate (Regulation and Development) Act, 2016 would prevail over SARFAESI, will not be applicable to the facts of the instant matter.

It is the assertion of the Respondent No.1 that before transferring the project by way of mortgage by the Promoter in favour of the Appellant Bank, the Promoter did not obtain prior written consent from two-third allottees and prior written approval of the Authority as required under Section 15 of the Act. As we find, there is no pleading on behalf of the added Respondent No.2 Ideal Real Estates Private Limited to deny such assertion of the Respondent No.1.

As stated above, the project was registered on 21st November, 2018 under the West Bengal Housing Industry Regulation Act, 2017 and the Deed of Mortgage was executed and registered on 10th June, 2019 i.e. after the registration of the project. As indicated in the Deed of Mortgage, at the time of mortgaging the project in favour of the Appellant Bank, the project had 82 unsold flats and 103 sold flats.

Learned Regulatory Authority by the impugned interim Order has noted that the Appellant Bank by virtue of the mortgage has been an Assignee of the Promoter and thereby the Yes Bank Limited will be treated as a Promoter as defined in Section 2(zk) of the Act. The Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority has held at paragraph 30 of the Judgment as under:

"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 the RERA Act. The Advance Law Lexicon by P. Ramanatha Aiyar explains 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 express 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 become bankrupt”.

It is the contention of the Appellant that by virtue of the Deed of Mortgage a charge was created on the project comprising the unsold flats therein with the sole object to secure the loan taken by the Promoter from the Bank. According to learned Counsel for the Appellant, this mortgage or charge for the purpose of securing repayment of the loan amount cannot be termed as transfer.

As observed by the Hon’ble High Court of Judicature for Rajasthan, by virtue of the mortgage, the Appellant Bank has been an Assignee of the Promoter. In such context, it will be apposite to refer to Section 58 of the Transfer of Property Act, 1882. As Section 58 of the Transfer of Property Act enjoins, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future date, or the performance of an engagement which may give rise to a pecuniary liability. This implies that by virtue of the registered Deed of Mortgage, transfer to the extent as stated in Section 58 of the Transfer of Property Act, has been effected in respect of the project of the Promoter. The project was registered under the West Bengal Housing Industry Regulation Act, 2017 on 21st November, 2018. As held by the Hon’ble Apex Court in the case of Forum for Peoples Collective Efforts (FPCE) Vs. State of West Bengal reported in (2021)3 SCC 599 and in the case of Saptaparna Ray in SLP(C) 16908 / 2022, the aforesaid registration of the project and all other legal acts in connection with the project will be guided by the Real Estate (Regulation and Development) Act, 2016 (RERA Act). Section 4 of the RERA Act, *inter alia*, says that while the Promoter shall make application to the Regulatory Authority for registration of the real estate project, he shall furnish the sanction plan, layout plan and specification of the proposed project or the phase thereof and the whole project as sanctioned by the Competent Authority, proforma of the Allotment Letter, Agreement for Sale and the Conveyance Deeds proposed to be

signed with the allottees. Since the project was registered in November 2018 prior to the Deed of Mortgage in June 2019, the Yes Bank Limited ought to have enquired of the details of the project as uploaded either on the website of the West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. It impliedly appears from the pleading of the Respondent No.1 that at the time of execution and registration of the Deed of Mortgage, there were number of allotments of flats and Agreements for Sale. Section 15 of the RERA Act regulates the transfer or assignment of the rights and liabilities of a Promoter in respect of a real estate project to a third party. Section 15 of the RERA Act, *inter alia*, reads as under :

“15. The Promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to the third party without obtaining prior written consent from two-third allottees except the Promoter and without the prior written approval of the Authority:

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be in the real estate project made by the erstwhile Promoter”.

As observed by the Hon'ble High Court of Judicature for Rajasthan in Union Bank of India and in view of discussion on Section 58 of the Transfer of Property Act, the Promoter transferred / assigned the project comprising the unsold flats to the Appellant Yes Bank Limited. No iota of documentary evidence has been adduced from the side of the Appellant Bank to show that the prior to transfer or assignment of the project in favour of the Bank, the Promoter obtained prior written consent from two-third allottees as well as the prior written approval of the West Bengal Housing Industry Regulatory Authority which had then legal entity. As a consequence thereof, the deed of mortgage shall not have any prejudicial effect upon the allottee or allottees or the buyers of the flats. Be that as it may, even if the transfer was effected lawfully, such transfer or assignment shall not affect the allotment or sale of the apartments as per the proviso to Section 15 of the RERA Act. In such connection, it will be profitable to refer to Section 11(h) of the RERA Act which provides that after the Promoter executes an Agreement for Sale for any apartment, not mortgage or create a charge on such apartment 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. All these legal provisions clearly demonstrate that transfer or assignment of a project by a Promoter to a third party or any mortgage or charge in respect of any flat of the project, shall not, in any way, affect the rights of an allottee or a buyer of a flat. On the other hand, Insolvency and Bankruptcy Code, 2016 also protects the interests of an allottee from whom any amount is raised under a Real Estate Project. As per Section 5(8) of the Code as amended vide Amendment Act 26 of 2018 with effect from 06.06.2018, the amount invested by an allottee shall be termed as financial debt and such financial debt is recoverable by an allottee under the various remedial measures as provided in the Code. Therefore, viewed from any angle, the rights and interests of an allottee are protected by different statutes.

Admittedly, the Appellant Bank approached the Debts Recovery Tribunal-1, Kolkata by filing an application registered as O.A. No. 2 of 2024 under Section 13(4) of the SARFAESI Act seeking measures to recover its secured debt by taking possession of the secured assets of the borrower for realising the secured assets and the Debts Recovery Tribunal passed order as sought for by the Appellant Bank.

It is argued on behalf of the Appellant that if the Respondent No.1 became aggrieved by the order passed by the Debts Recovery Tribunal, it ought to have approached the same Debts Recovery Tribunal under Section 17 of the SARFAESI Act. Section 17(1) of the SARFAESI Act says that any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of the Section 13 taken by the secured creditor or his authorised 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 45 (forty-five) days from the date on which such measure had been taken.

The legal proposition as reflected above clearly demonstrates that despite any mortgage or charge created in respect of a project, the rights of an allottee shall remain unaffected. However, the Hon'ble Apex Court in disposing of the Special Leave to Appeal (C) Nos.1861-1871 of 2022 challenging the Judgment of the Hon'ble

High Court of Judicature for Rajasthan passed in the Union Bank of India, by order dated 14th February, 2022, has held that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as secured creditor if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act.

Therefore, in view of the above legal proposition, the learned Regulatory Authority was within legal domain to entertain the complaint of the Respondent No.1 challenging the order passed by the Debts Recovery Tribunal under Section 13(4) of SARFAESI Act.

As discussed on the provisions under Section 15 of the RERA Act, the transfer or assignment of the project by way of mortgage is hit by law sans permission from the two-third of the allottees and the WBHIRA or WBRERA. Even if it is assumed that this transfer or assignment is lawful in that event also, the Appellant Bank put into the shoes of the Promoter as an assignee or transferee shall be required to independently comply with all the pending obligations under the provisions of the RERA Act or the Rules and Regulations made thereunder and the pending obligations as per the Agreement for Sale entered into by the erstwhile Promoter with the allottees under Section 15(2) of the RERA Act.

Now, it is axiomatic, in view of the legal position as above, while the rights of an allottee or the flat buyer are protected under the provisions of the RERA Act, no question arises that an allottee or a flat buyer would approach the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act.

Therefore, we do not find any illegality or impropriety in the impugned interim Order as passed by the learned Regulatory Authority.

We find that the learned Regulatory Authority passed the interim Order in exercise of power under Section 36 of the RERA Act on urgent measure before exchange of affidavits between the parties. The learned Regulatory Authority, however, directed the parties to exchange their respective affidavits within a stipulated period. That being so, the learned Regulatory Authority shall have to dispose of the complaint after exchange of the affidavits between the parties and

hearing the parties. In such view of the matter, we note herein that the interim Order passed by the learned Regulatory Authority shall be without prejudice to the rights and contentions of the parties.

We feel that for proper adjudication of the complaint, the learned Regulatory Authority may be directed to add the Promoter as a Respondent to the complaint.

In view of the above, the appeal is dismissed on contest. Consequently, the application for stay having no merit is also dismissed.

No order as to costs.

The interim Order passed by the learned Regulatory Authority is hereby affirmed and this order will continue till disposal of the complaint.

The learned Regulatory Authority is directed to add the Promoter Ideal Real Estates Private Limited as a Respondent to the complaint and serve notice upon it.

The added Respondent-Promoter shall be given opportunity to file affidavit to place its stand.

The learned Regulatory Authority shall dispose of the complaint as expeditiously as possible.

Let a copy of this Judgment be communicated to the respective parties through their learned Advocate and the authorised representative as well as the learned Regulatory Authority.

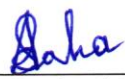
Sd/-
JUSTICE RABINDRANATH SAMANTA
Chairperson
West Bengal Real Estate Appellate Tribunal

Sd/-
GOUR SUNDAR BANERJEE
Judicial Member
West Bengal Real Estate Appellate Tribunal

Sd/-
Dr. SUBRAT MUKHERJEE
Technical/Administrative Member
West Bengal Real Estate Appellate Tribunal

By Order of WBREAT

Dated: 09.01.2025



Authorised Signatory

**IN THE WEST BENGAL REAL ESTATE APPELLATE TRIBUNAL
KOLKATA - 700 075**

- Present: 1. Justice Rabindranath Samanta
Hon'ble Chairperson
2. Shri Gour Sundar Banerjee
Hon'ble Judicial Member
3. Dr. Subrat Mukherjee
Hon'ble Administrative Member

WBREAT/APPEAL NO. - 018/2024

Yes Bank Limited

Stephen House, 56A, Hemanta Basu Sarani,
Ground and Mezzanine Floor,
Kolkata - 700 001.

..... Appellant

- Vs -

1. Enhance Infrastructure Private Limited

Flat No.10B, Block-C, 10th Floor and
Flat No.11B, Block-C, 11th Floor
Ideal Exotica,
21, Pramatha Chowdhury Sarani,
New Alipore, Kolkata - 700053.

.....Respondent No.1

2. Ideal Real Estates Private Limited

50, Jawaharlal Nehru Road, Post Office - Little Russel Street,
Police Station - Shakespeare Sarani, Kolkata - 700 071.

.....Respondent No.2

Mr. Sourjya Roy, Advocate

For the Appellant

Mr. Gopal Krishna Lodha, Chartered Accountant and
authorised representative

For the Respondent No. 1

Heard on : **09.12.2024**

Judgment on : **09.01.2025**

Rabindranath Samanta, J:-

Aggrieved by an interim order dated 07.06.2024 passed by the learned West Bengal Real Estate Regulatory Authority (For Short 'Regulatory Authority') in Complaint No. WBRERA/COM000893, the Appellant Yes Bank Limited has approached this Tribunal by preferring this appeal.

The complaint registered as WBRERA/COM000893 was brought by the Respondent No. 1 / Complainant **Enhance Infrastructure Private Limited** against the Appellant Yes Bank Limited. The Promoter namely Ideal Real Estates Private Limited was not a party to the Complaint. However, during hearing of the appeal, this Tribunal thought it proper to add the Promoter Ideal Real Estates Private Limited as a necessary party to the appeal. Accordingly, the Promoter has been impleaded as Respondent No.2 in the appeal.

Though, after service of notice upon it, the Respondent No.2 appeared before this Tribunal through a learned Advocate, but it did not file any pleading to contest the appeal. On the previous dates of hearing of the appeal, a learned Advocate appeared for the Respondent No.2 before us, but she stopped participating in the final hearing of the appeal on 09.12.2024.

The Complainant / Respondent No.1 Enhance Infrastructure Private Limited filed the complaint with the learned Regulatory Authority on the facts which may be summarised as under:

On the representation made by the Promoter Ideal Real Estates Private Limited, the Respondent No.1 booked two residential apartments – one being Flat No.10B, Block-‘C’ on 10th Floor in a project namely ‘Ideal Exotica’ at Premises No. 21, Pramatha Chowdhury Sarani, New Alipore, Kolkata – 700 053, having a carpet area of 2169 Sq. feet (approximately) along with exclusive balcony / terrace / garden and servant quarters measuring carpet area of 39 Sq. feet, having built-up area of 2380 Sq. feet and super built-up area of 3260 Sq. feet together with a covered car parking space and one open car parking space and the another being Flat No.11B, Block-‘C’ on 11th Floor in the aforesaid project and premises, having a carpet area of 1747 Sq. feet (approximately), built-up area of 1934 Sq. feet and super built-up area of 2560 Sq. feet together with two open car parking spaces. The Respondent No.1, by a registered Deed of Conveyance dated 17th March, 2023 purchased the flat no.10B at the consideration of Rs.3,14,00,000/- (Rupees three crore fourteen lacs only). This Respondent by an another registered Deed of Conveyance dated 17th March, 2023 purchased the flat no.11B at the consideration of Rs.2,27,05,200/- (Rupees two crore twenty-seven lacs five thousand two hundred

only). When the Deeds of Conveyance were executed on 17th March, 2023, there was nothing in the records of the West Bengal Regulatory Authority / WBHIRA that any alleged mortgage had been created. Be it noted that prior to execution and registration of the Deeds of Conveyance, the Respondent No.1 was put in possession of the flats by virtue of two possession letters dated 26.04.2021 and 29.12.2021. The Respondent No.1 became a member of the Flat Owners Association namely 'Ideal Exotica Owners Association' since the date of formation of the said Association and it has been paying the maintenance charges in respect of the aforesaid flats since the time it got possession of the flats. While it was in peaceful occupation of the flats, the Respondent No.1 became shocked after seeing a public notice of symbolic possession of the flats published in a daily newspaper dated March 18, 2024.

This Respondent came to learn that the public notice of symbolic possession was issued pursuant to a direction passed by the Debts Recovery Tribunal-1, Kolkata, in O.A. No.2 of 2024 on 21.02.2024. The Debts Recovery Tribunal passed the order in the aforesaid proceeding brought by the Appellant Yes Bank Limited against the Promoter. The Promoter Ideal Real Estates Private Limited took loan from the Bank and since the Bank failed to repay the loan, the Bank declared the accounts of the Promoter as Non-Performing Asset (NPA) and subsequently approached the Debts Recovery Tribunal for taking possession of the apartment belonging to the Respondent No.1. As a bonafide purchaser of the flats the Respondent No.1 was surprised with the aforesaid proceeding brought by the Bank for taking symbolic possession of its flats. The Respondent No.1 submits that before the mortgage was created in favour of the Appellant, there were already allotments and/or Agreements for Sale in respect of the flats of the project. This Respondent contends that without permission from the allottees, the purported mortgage could not have been entered into and as such the mortgage has now become ineffective. Since the Appellant Bank was in every mood to take physical possession of the flats and to sell it by auction in compliance with the order passed by the Debts Recovery Tribunal, the Respondent No.1 / Complainant by bringing the complaint before the learned Regulatory Authority sought for the following reliefs :

- "1) To direct the Yes Bank Limited to stop all proceedings with respect to the schedule property and restrain from taking possession of the property.
- 2) To direct the Yes Bank Limited to release the flats 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 the Debts 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 learned Regulatory Authority upon hearing the learned authorised representative for the Respondent No.1 / Complainant and the learned Advocate for the Appellant Bank, by the impugned interim Order passed the following directions :

- "a) The Respondent Yes Bank Limited is hereby directed to stop all the proceedings including notice for auction scheduled to be held on 28th June, 2024 and / or on any future date with respect to the scheduled property i.e. Flat No.10B, Block-'C' on 4th Floor and Flat No.11B, Block-'C' on 11th Floor of the subject matter project 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 Yes Bank Limited dated 16th March, 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 disposal of this matter or until further order, whichever is earlier.
- e) The Respondent Bank is also directed to take all necessary steps to vacate the physical possession of the property being Flat No.10B, Block-'C' on 4th Floor and Flat No.11B, Block-'C' on 11th Floor of the subject matter project and deliver it to the complainant within seven days from the date of receipt of this order of the Authority through e-Mail.
- f) The Complainant is directed to submit his total submission regarding his complaint petition on a Notarised 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 e-Mail.
- g) The Respondents are hereby directed to submit his written response on Notarised Affidavit regarding the complaint petition and affidavit of the complaint, 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 complaint either by post or by e-Mail, whichever is earlier."

A reading of the impugned Order passed by the learned Regulatory Authority shows that the learned Regulatory Authority placing reliance on a decision dated 24th December, 2021 passed by the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc. and the definition of Promoter under Section 2(zk) has observed that by virtue of Deed of Mortgage executed between the Promoter Ideal Real Estates Private Limited and Yes Bank Limited, the Bank became a Promoter as an assignee

and all the obligations of a Promoter were cast upon the bank. The learned Regulatory Authority, by referring to the order dated 14th February, 2022 passed by the Hon'ble Apex Court in petition for Special Leave to Appeal (C) Nos. 1861-1871 / 2022 (Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc.) has observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as a secured creditors if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act. In the light of such legal proposition and considering the documents on record, the learned Regulatory Authority was satisfied that the Respondent No.1 / Complainant was able to establish a prima facie case to get an interim order and accordingly it passed the interim order as excerpted above in exercise of power under Section 36 of the Real Estate (Regulation and Development) Act, 2016.

It is contended by the Appellant Bank in the Memorandum of Appeal that on the representation made by the Promoter the Bank sanctioned a term loan to the tune of Rs. 320,00,00,000/- (Rupees three hundred twenty crore only) and FITL i.e. Funded Interest Term Loan to the tune of Rs.235,00,86,239.48 (Rupees two hundred thirty-five crore eighty-six thousand two hundred thirty-nine and paisa forty-eight only) for the purpose of financing of existing secured and unsecured debts along with part financing of the construction cost of the project 'Ideal Exotica'. The facilities extended by the Appellant Bank to the Respondent No.2 were, *inter alia*, secured by charge and mortgage over the unsold units of the project and other projects as detailed in loan and security documents. In that regard a registered Deed of Mortgage was entered into on June 10, 2019 between the Appellant Bank and the Promoter to create the said Mortgage and charge over the properties of the Promoter. By virtue of this Deed of Mortgage, the subject apartment being Flat Nos.10B, Block-'C' and 11B, Block-'C' remained mortgaged and charged to secure the repayment of loan amount availed of by the Promoter. The Appellant Bank submits that since the Promoter failed to repay the loan amount, it approached the Debts Recovery Tribunal-1, Kolkata under the relevant provisions of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) seeking reliefs so that it could recover the loan amount.

Mr. Sourjya Roy, learned Counsel appearing for the Appellant Bank submits that the Mortgage Deed was executed and registered on June 10, 2019 much prior to the Agreement for Sale or booking of the flats between the Respondent No.1 and Promoter. The mortgage / charge was created in respect of the project comprising the unsold flats therein only to secure the loan amount granted by the Bank to the Promoter. Learned Counsel submits that while the mortgage was created, the Promoter did not disclose or divulge that allotments or agreements for sale in respect of the flats were made between the Promoter and the intending purchasers, if any. Learned Counsel argues that since the borrower failed to repay the loan amount, his client rightly approached the Debts Recovery Tribunal under Section 13(4) of the SARFAESI Act to recover its secured debt. According to learned Counsel, since the mortgage took place much prior to the Agreement for Sale or the date of booking in respect of the subject apartment, the decision of the Hon'ble Rajasthan High Court in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors. and the order dated 14th February, 2022 of the Hon'ble Apex Court in the Petition for Special Leave to Appeal (C) Nos.1861-1871/2022 (Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors.) will not apply to the factual matrix as placed by the Respondent No.1. The mortgage, by which repayment of the debt was secured by the Promoter, will not denote the Bank as an assignee. Learned Counsel submits that the complaint filed by the Respondent No.1 is hit by the doctrine of 'Caveat Emptor' meaning 'let the buyer beware'. In such context, learned Counsel argues that in the setting of the facts as portrayed by his client, the provisions of the Real Estate (Regulation and Development) Act, 2016 would not apply to the instant matter.

Mr. Gopal Krishna Lodha, Chartered Accountant and authorised representative for the Respondent No.1 submits that the Promoter Ideal Real Estates Private Limited registered the project namely 'Ideal Exotica' with the West Bengal Housing Industry Regulatory Authority vide Registration No.HIRA/P/KOL/2018/000177. After registration of the project there were

allotments of flats and Agreements for Sale between the Promoter and a number of Allottees in respect of the project. Mr. Lodha submits that since the Promoter transferred the project by way of mortgage in favour of the Appellant Bank to secure the loan amount taken by it from the Bank, the Promoter ought to have obtained prior written consent from two-third allottees and prior written approval of the Regulatory Authority. By not doing so, the transfer by way of mortgage is hit by Section 15 of the Real Estate (Regulation and Development) Act. Mr. Lodha vehemently argues that the learned Regulatory Authority by placing reliance on the Judgment of the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India and the solemn order dated 14th February, 2022 of the Hon'ble Apex Court in the SLP(C) Nos. 1861-1871/2022, has rightly observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in the RERA Act would prevail and the Regulatory 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. The learned Regulatory Authority has also rightly observed that as an assignee the Appellant Bank has become the Promoter in respect of the flats of the project. On such score, Mr. Lodha submits that the interim Order as passed by the learned Regulatory Authority under Section 36 of the Act is sustainable in law and the appeal is liable to be dismissed.

Though the Promoter Ideal Real Estates Private Limited has been impleaded as a Respondent and it has represented itself before this Tribunal through a learned Advocate on some dates, but no pleading has been submitted on behalf of the Promoter. So, no written stand of the added Respondent No.2 Ideal Real Estates Private Limited is available before this Tribunal. However, an inkling of the stand of the Respondent No.2 surfaces from the principal Deed of Mortgage dated 10th June, 2019 executed and registered between Ideal Real Estates Private Limited and the Appellant Yes Bank Limited. By this instrument, the Promoter mortgaged 82 unsold flats as described in Schedule II of the Deed in favour of the Appellant Bank to secure the loan amount which the Promoter took from the Bank. Besides, there were 103 sold flats in the project as described in Schedule-III of the Deed. As it is evident,

the unsold and sold flats as depicted in the schedules all stood on 31.05.2019. This manifests by implication that while the Deed of Mortgage was executed and registered, there were allotment of flats in favour of a number of allottees and there were Agreements for Sale between the Promoter and the Allottees. But, in this Deed there is no indication of the registration of the project undertaken by the Promoter either with West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. However, the Deed of Conveyance between the Respondent No.1 M/s. Enhance Infrastructure Private Limited and the Promoter Ideal Real Estates Private Limited executed and registered on 28th October, 2021 shows that the project of the Promoter was registered with the West Bengal Housing Industry Regulatory Authority on 21st November, 2018 under Registration No.HIRA/P/KOL/2018/000177 under the relevant provision of the West Bengal Housing Industry Regulation Act, 2017. In this regard, it is pertinent to mention that the West Bengal Housing Industry Regulation Act, 2017 has been struck down as ultra vires the Constitution by the Hon'ble Apex Court in a decision dated 4th May, 2021 in the case of Forum for People's Collective Efforts (FPCE) Vs State of West Bengal. However, the Hon'ble Apex Court in this decision has observed that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the Judgment. In an order dated 12.05.2023 passed in the Petition for Special Leave to Appeal (C) No.16908 / 2022 (Saptaparna Ray Vs. District Magistrate and Collector, North 24 Parganas and Others), the Hon'ble Apex Court has held that this principle shall also apply to orders which were passed whether in original or in the course of the execution prior to the date of Judgment on 04.05.2021. All such orders shall be executed in accordance with law, as if they were issued under the RERA. In such legal position, the registration of the project of the Promoter under the provisions of the West Bengal Housing Industry Regulation Act, 2017 will continue to be governed under the Real Estate (Regulation and Development) Act, 2016. Similarly, any act or omission between the Promoter and the Allottees will also be guided by the provisions of the Real Estate (Regulation and Development) Act, 2016.

As submitted on behalf of the Appellant, since the Mortgage Deed was executed between the Promoter and the Appellant Bank on 10th June, 2019 much prior to the execution and registration of the Agreement for Sale between the Promoter and the Respondent No.1, the legal principles enunciated by the Hon'ble High Court of Judicature for Rajasthan and the Hon'ble Apex Court in the case of Union Bank of India that the Real Estate (Regulation and Development) Act, 2016 would prevail over SARFAESI, will not be applicable to the facts of the instant matter.

It is the assertion of the Respondent No.1 that before transferring the project by way of mortgage by the Promoter in favour of the Appellant Bank, the Promoter did not obtain prior written consent from two-third allottees and prior written approval of the Authority as required under Section 15 of the Act. As we find, there is no pleading on behalf of the added Respondent No.2 Ideal Real Estates Private Limited to deny such assertion of the Respondent No.1.

As stated above, the project was registered on 21st November, 2018 under the West Bengal Housing Industry Regulation Act, 2017 and the Deed of Mortgage was executed and registered on 10th June, 2019 i.e. after the registration of the project. As indicated in the Deed of Mortgage, at the time of mortgaging the project in favour of the Appellant Bank, the project had 82 unsold flats and 103 sold flats.

Learned Regulatory Authority by the impugned interim Order has noted that the Appellant Bank by virtue of the mortgage has been an Assignee of the Promoter and thereby the Yes Bank Limited will be treated as a Promoter as defined in Section 2(zk) of the Act. The Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority has held at paragraph 30 of the Judgment as under:

"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 the RERA Act. The Advance Law Lexicon by P. Ramanatha Aiyar explains 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 express 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 become bankrupt”.

It is the contention of the Appellant that by virtue of the Deed of Mortgage a charge was created on the project comprising the unsold flats therein with the sole object to secure the loan taken by the Promoter from the Bank. According to learned Counsel for the Appellant, this mortgage or charge for the purpose of securing repayment of the loan amount cannot be termed as transfer.

As observed by the Hon'ble High Court of Judicature for Rajasthan, by virtue of the mortgage, the Appellant Bank has been an Assignee of the Promoter. In such context, it will be apposite to refer to Section 58 of the Transfer of Property Act, 1882. As Section 58 of the Transfer of Property Act enjoins, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future date, or the performance of an engagement which may give rise to a pecuniary liability. This implies that by virtue of the registered Deed of Mortgage, transfer to the extent as stated in Section 58 of the Transfer of Property Act, has been effected in respect of the project of the Promoter. The project was registered under the West Bengal Housing Industry Regulation Act, 2017 on 21st November, 2018. As held by the Hon'ble Apex Court in the case of Forum for Peoples Collective Efforts (FPCE) Vs. State of West Bengal reported in (2021)3 SCC 599 and in the case of Saptaparna Ray in SLP(C) 16908 / 2022, the aforesaid registration of the project and all other legal acts in connection with the project will be guided by the Real Estate (Regulation and Development) Act, 2016 (RERA Act). Section 4 of the RERA Act, *inter alia*, says that while the Promoter shall make application to the Regulatory Authority for registration of the real estate project, he shall furnish the sanction plan, layout plan and specification of the proposed project or the phase thereof and the whole project as sanctioned by the Competent Authority, proforma of the

Allotment Letter, Agreement for Sale and the Conveyance Deeds proposed to be signed with the allottees. Since the project was registered in November 2018 prior to the Deed of Mortgage in June 2019, the Yes Bank Limited ought to have enquired of the details of the project as uploaded either on the website of the West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. It impliedly appears from the pleading of the Respondent No.1 that at the time of execution and registration of the Deed of Mortgage, there were number of allotments of flats and Agreements for Sale. Section 15 of the RERA Act regulates the transfer or assignment of the rights and liabilities of a Promoter in respect of a real estate project to a third party. Section 15 of the RERA Act, *inter alia*, reads as under :

“15. The Promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to the third party without obtaining prior written consent from two-third allottees except the Promoter and without the prior written approval of the Authority:
Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be in the real estate project made by the erstwhile Promoter”.

As observed by the Hon'ble High Court of Judicature for Rajasthan in Union Bank of India and in view of discussion on Section 58 of the Transfer of Property Act, the Promoter transferred / assigned the project comprising the unsold flats to the Appellant Yes Bank Limited. No iota of documentary evidence has been adduced from the side of the Appellant Bank to show that the prior to transfer or assignment of the project in favour of the Bank, the Promoter obtained prior written consent from two-third allottees as well as the prior written approval of the West Bengal Housing Industry Regulatory Authority which had then legal entity. As a consequence thereof, the deed of mortgage shall not have any prejudicial effect upon the allottee or allottees or the buyers of the flats. Be that as it may, even if the transfer was effected lawfully, such transfer or assignment shall not affect the allotment or sale of the apartments as per the proviso to Section 15 of the RERA Act. In such connection, it will be profitable to refer to Section 11(h) of the RERA Act which provides that after the Promoter executes an Agreement for Sale for any

apartment, not mortgage or create a charge on such apartment 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. All these legal provisions clearly demonstrate that transfer or assignment of a project by a Promoter to a third party or any mortgage or charge in respect of any flat of the project, shall not, in any way, affect the rights of an allottee or a buyer of a flat. On the other hand, Insolvency and Bankruptcy Code, 2016 also protects the interests of an allottee from whom any amount is raised under a Real Estate Project. As per Section 5(8) of the Code as amended vide Amendment Act 26 of 2018 with effect from 06.06.2018, the amount invested by an allottee shall be termed as financial debt and such financial debt is recoverable by an allottee under the various remedial measures as provided in the Code. Therefore, viewed from any angle, the rights and interests of an allottee are protected by different statutes.

Admittedly, the Appellant Bank approached the Debts Recovery Tribunal-1, Kolkata by filing an application registered as O.A. No. 2 of 2024 under Section 13(4) of the SARFAESI Act seeking measures to recover its secured debt by taking possession of the secured assets of the borrower for realising the secured assets and the Debts Recovery Tribunal passed order as sought for by the Appellant Bank.

It is argued on behalf of the Appellant that if the Respondent No.1 became aggrieved by the order passed by the Debts Recovery Tribunal, it ought to have approached the same Debts Recovery Tribunal under Section 17 of the SARFAESI Act. Section 17(1) of the SARFAESI Act says that any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of the Section 13 taken by the secured creditor or his authorised 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 45 (forty-five) days from the date on which such measure had been taken.

The legal proposition as reflected above clearly demonstrates that despite any mortgage or charge created in respect of a project, the rights of an allottee shall remain unaffected. However, the Hon'ble Apex Court in disposing of the Special

Leave to Appeal (C) Nos.1861-1871 of 2022 challenging the Judgment of the Hon'ble High Court of Judicature for Rajasthan passed in the Union Bank of India, by order dated 14th February, 2022, has held that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as secured creditor if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act.

Therefore, in view of the above legal proposition, the learned Regulatory Authority was within legal domain to entertain the complaint of the Respondent No.1 challenging the order passed by the Debts Recovery Tribunal under Section 13(4) of SARFAESI Act.

As discussed on the provisions under Section 15 of the RERA Act, the transfer or assignment of the project by way of mortgage is hit by law sans permission from the two-third of the allottees and the WBHIRA or WBRERA. Even if it is assumed that this transfer or assignment is lawful in that event also, the Appellant Bank put into the shoes of the Promoter as an assignee or transferee shall be required to independently comply with all the pending obligations under the provisions of the RERA Act or the Rules and Regulations made thereunder and the pending obligations as per the Agreement for Sale entered into by the erstwhile Promoter with the allottees under Section 15(2) of the RERA Act.

Now, it is axiomatic, in view of the legal position as above, while the rights of an allottee or the flat buyer are protected under the provisions of the RERA Act, no question arises that an allottee or a flat buyer would approach the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act.

Therefore, we do not find any illegality or impropriety in the impugned interim Order as passed by the learned Regulatory Authority.

We find that the learned Regulatory Authority passed the interim Order in exercise of power under Section 36 of the RERA Act on urgent measure before exchange of affidavits between the parties. The learned Regulatory Authority, however, directed the parties to exchange their respective affidavits within a stipulated period. That being so, the learned Regulatory Authority shall have to

dispose of the complaint after exchange of the affidavits between the parties and hearing the parties. In such view of the matter, we note herein that the interim Order passed by the learned Regulatory Authority shall be without prejudice to the rights and contentions of the parties.

We feel that for proper adjudication of the complaint, the learned Regulatory Authority may be directed to add the Promoter as a Respondent to the complaint.

In view of the above, the appeal is dismissed on contest. Consequently, the application for stay having no merit is also dismissed.

No order as to costs.

The interim Order passed by the learned Regulatory Authority is hereby affirmed and this order will continue till disposal of the complaint.

The learned Regulatory Authority is directed to add the Promoter Ideal Real Estates Private Limited as a Respondent to the complaint and serve notice upon it.

The added Respondent-Promoter shall be given opportunity to file affidavit to place its stand.

The learned Regulatory Authority shall dispose of the complaint as expeditiously as possible.

Let a copy of this Judgment be communicated to the respective parties through their learned Advocate and the authorised representative as well as the learned Regulatory Authority.

Sd/-

JUSTICE RABINDRANATH SAMANTA

Chairperson

West Bengal Real Estate Appellate Tribunal

Sd/-

GOUR SUNDAR BANERJEE

Judicial Member

West Bengal Real Estate Appellate Tribunal

Sd/-

Dr. SUBRAT MUKHERJEE

Technical/Administrative Member

West Bengal Real Estate Appellate Tribunal

By Order of WBREAT

Dated: 09.01.2025



Authorised Signatory

**IN THE WEST BENGAL REAL ESTATE APPELLATE TRIBUNAL
KOLKATA - 700 075**

Present: 1. Justice Rabindranath Samanta
Hon'ble Chairperson

2. Shri Gour Sundar Banerjee
Hon'ble Judicial Member

3. Dr. Subrat Mukherjee
Hon'ble Administrative Member

WBREAT/APPEAL NO. – 019/2024

Yes Bank Limited

..... Appellant

Stephen House, 56A, Hemanta Basu Sarani,
Ground and Mezaanine Floor,
Kolkata – 700 001.

- Vs -

1. Nippon Ispat Private Limited

.....Respondent No.1

Flat Nos. 4A & 4B, Block-D, 4th Floor,
Ideal Exotica,
21, Pramatha Chowdhury Sarani,
New Alipore, Kolkata – 700053.

2. Ideal Real Estates Private Limited

.....Respondent No.2

50, Jawaharlal Nehru Road, Post Office – Little Russel Street,
Police Station – Shakespeare Sarani, Kolkata – 700 071.

Mr. Sourjya Roy, Advocate

For the Appellant

Mr. Gopal Krishna Lodha, Chartered Accountant and
authorised representative

For the Respondent No. 1

Heard on : **09.12.2024**

Judgment on : **09.01.2025**

Rabindranath Samanta, J:-

Aggrieved by an interim order dated 07.06.2024 passed by the learned West Bengal Real Estate Regulatory Authority (For Short 'Regulatory Authority') in Complaint No. WBRERA/COM000894, the Appellant Yes Bank Limited has approached this Tribunal by preferring this appeal.

The complaint registered as WBRERA/COM000894 was brought by the Respondent No. 1 / Complainant Nippon Ispat Private Limited against the Appellant Yes Bank Limited. The Promoter namely Ideal Real Estates Private Limited was not a party to the Complaint. However, during hearing of the appeal, this Tribunal thought it proper to add the Promoter Ideal Real Estates Private Limited as a necessary party to the appeal. Accordingly, the Promoter has been impleaded as Respondent No.2 in the appeal.

Though, after service of notice upon it, the Respondent No.2 appeared before this Tribunal through a learned Advocate, but it did not file any pleading to contest the appeal. On the previous dates of hearing of the appeal, a learned Advocate appeared for the Respondent No.2 before us, but she stopped participating in the final hearing of the appeal on 09.12.2024.

The Complainant / Respondent No. 1 Nippon Ispat Private Limited filed the complaint with the learned Regulatory Authority on the facts which may be summarised as under:

On the representation made by the Promoter Ideal Real Estates Private Limited, the Respondent No.1 booked two residential apartments – one being Flat No. 4A, Block-‘D’, 4th Floor in a project namely ‘Ideal Exotica’ at Premises No. 21, Pramatha Chowdhury Sarani, New Alipore, Kolkata – 700 053, having a carpet area of 1829 Sq. feet (approximately) along with exclusive balcony / terrace / garden measuring carpet area of 252 Sq. feet and servant quarters measuring carpet area of 74 Sq. feet, having built-up area of 2314 Sq. feet and super built-up area of 3170 Sq. feet together with two covered and two open car parking spaces and another being Flat No. 4B, Block-‘D’, 4th Floor at the aforesaid project and premises having carpet area of 2029 Sq. feet (approximately) along with exclusive balcony / terrace / garden measuring carpet area of 229 Sq. feet and servant quarters measuring carpet area of 84 Sq. feet, having built-up area of 2500 Sq. feet and super built-up area of 3425 Sq. feet together with two covered and two open car parking spaces. The Respondent No.1, entered into an Agreement for Sale with the Promoter on 20th July, 2022 for purchasing the Flat No. 4A at the consideration of Rs.2,87,95,000/- (Rupees two crore eighty seven lacs ninety five thousand only). On the other hand, this Respondent entered into an another Agreement for Sale with the Promoter on the same date for purchasing the Flat No. 4B at the consideration of

Rs.3,14,12,500/-(Rupees three crore fourteen lacs twelve thousand five hundred only). While the Respondent No. 1 entered into the agreements there was nothing in the records of the learned Regulatory Authority / WBHIRA that any mortgage had been created. The Respondent No.1, thereafter, got peaceful vacant possession of the aforesaid two flats since the date of Agreements on 20th July, 2022. The Respondent No.1 paid the entire consideration amount to the Respondent No.2 for the aforesaid two flats and in turn, the Respondent No.2 executed and registered two separate Deeds of Conveyance on 29th September, 2022 in respect of the two flats in favour of the Respondent No. 1. It is pertinent to mention that after this Respondent got possession of the flats and since the formation of the 'Flat Owners Association' it became a member of the Association namely 'Ideal Exotica Flat Owners Association'.

After purchase of the aforesaid flats the Respondent No. 1 got the Flat No. 4A mutated in its name with Kolkata Municipal Corporation vide Mutation Case No.0/081/16-DEC-22/142316 dated 16th December, 2022 and was allotted Assessee no.110812303053. It got its name mutated in respect of Flat No. 4B with K.M.C. vide Mutation Case No. 0/081/16-DEC-22/142315 dated 16th December, 2022 and was allotted Assessee no.110812303065. This Respondent has been paying the corporation tax as and when due.

While the Respondent No. 1 was in peaceful occupation of the flats, it became shocked after seeing a public notice of symbolic possession of the flats published in a daily newspaper dated March 18, 2024.

This Respondent came to learn that the public notice of symbolic possession was issued pursuant to a direction passed by the Debts Recovery Tribunal-1, Kolkata, in O.A. No.2 of 2024 on 21.02.2024. The Debts Recovery Tribunal passed the order in the aforesaid proceeding brought by the Appellant Yes Bank Limited against the Promoter. The Promoter Ideal Real Estates Private Limited took loan from the Bank and since the Bank failed to repay the loan, the Bank declared the accounts of the Promoter as Non-Performing Asset (NPA) and subsequently approached the Debts Recovery Tribunal for taking possession of the apartments belonging to the Respondent No.1. As a bonafide purchaser of the flats the Respondent No.1 was surprised with the aforesaid proceeding brought by the Bank for taking symbolic possession of its flat. The Respondent No.1

submits that before the mortgage was created in favour of the Appellant, there were already allotments and/or Agreements for Sale in respect of the flats of the project. This Respondent contends that without permission from the allottees, the purported mortgage could not have been entered into and as such the mortgage has now become ineffective. Since the Appellant Bank was in every mood to take physical possession of the flat and to sell it by auction in compliance with the order passed by the Debts Recovery Tribunal, the Respondent No.1 / Complainant by bringing the complaint before the learned Regulatory Authority sought for the following reliefs :

- "1) To direct the Yes Bank Limited to stop all proceedings with respect to the schedule property and restrain from taking possession of the property.
- 2) To direct the Yes Bank Limited to release the flats 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 the Debts Recovery Tribunal-1, Kolkata to recall the order dated 21.02.2024 passed in O.A. No. 2 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 learned Regulatory Authority upon hearing the learned authorised representative for the Respondent No.1 / Complainant and the learned Advocate for the Appellant Bank, by the impugned interim Order passed the following directions :

- "a) The Respondent Yes Bank Limited is hereby directed to stop all the proceedings including notice for auction scheduled to be held on 28th June, 2024 and / or on any future date with respect to the scheduled property i.e. Flat Nos. 4A & 4B, Block – 'D' on 4th Floor of the subject matter project 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 Yes Bank Limited dated 16th March, 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 disposal of this matter or until further order, whichever is earlier.
- e) The Respondent Bank is also directed to take all necessary steps to vacate the physical possession of the flat being Nos. 4A & 4B, Block – 'D' on 4th Floor of the subject matter project and deliver it to the complainant within seven days from the date of receipt of this order of the Authority through e-Mail.
- f) The Complainant is directed to submit his total submission regarding his complaint petition on a Notarised 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 e-Mail.
- g) The Respondents are hereby directed to submit his written response on Notarised Affidavit regarding the complaint petition and affidavit of the complaint, 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 complaint either by post or by e-Mail, whichever is earlier."

A reading of the impugned Order passed by the learned Regulatory Authority shows that the learned Regulatory Authority placing reliance on a decision dated 24th

December, 2021 passed by the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc. and the definition of Promoter under Section 2(zk) has observed that by virtue of Deed of Mortgage executed between the Promoter Ideal Real Estates Private Limited and Yes Bank Limited, the Bank became a Promoter as an assignee and all the obligations of a Promoter were cast upon the bank. The learned Regulatory Authority, by referring to the order dated 14th February, 2022 passed by the Hon'ble Apex Court in petition for Special Leave to Appeal (C) Nos. 1861-1871 / 2022 (Union Bank of India Vs Rajasthan Real Estate Regulatory Authority and Ors., etc.) has observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as a secured creditors if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act. In the light of such legal proposition and considering the documents on record, the learned Regulatory Authority was satisfied that the Respondent No.1 / Complainant was able to establish a prima facie case to get an interim order and accordingly it passed the interim order as excerpted above in exercise of power under Section 36 of the Real Estate (Regulation and Development) Act, 2016.

It is contended by the Appellant Bank in the Memorandum of Appeal that on the representation made by the Promoter the Bank sanctioned a term loan to the tune of Rs. 320,00,00,000/- (Rupees three hundred twenty crore only) and FITL i.e. Funded Interest Term Loan to the tune of Rs.235,00,86,239.48 (Rupees two hundred thirty-five crore eighty-six thousand two hundred thirty-nine and paise forty-eight only) for the purpose of financing of existing secured and unsecured debts along with part financing of the construction cost of the project 'Ideal Exotica'. The facilities extended by the Appellant Bank to the Respondent No.2 were, *inter alia*, secured by charge and mortgage over the unsold units of the project and other projects as detailed in loan and security documents. In that regard a registered Deed of Mortgage was entered into on June 10, 2019 between the Appellant Bank and the Promoter to create the said Mortgage and charge over the properties of the Promoter. By virtue of this Deed of Mortgage, the subject apartment being Nos. 4A & 4B, Block – 'D' remained mortgaged and charged to

secure the repayment of loan amount availed of by the Promoter. The Appellant Bank submits that since the Promoter failed to repay the loan amount, it approached the Debts Recovery Tribunal-1, Kolkata under the relevant provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) seeking reliefs so that it could recover the loan amount.

Mr. Sourjya Roy, learned Counsel appearing for the Appellant Bank submits that the Mortgage Deed was executed and registered on June 10, 2019 much prior to the Agreement for Sale or booking of the flats between the Respondent No. 1 and Promoter. The mortgage / charge was created in respect of the project comprising the unsold flats therein only to secure the loan amount granted by the Bank to the Promoter. Learned Counsel submits that while the mortgage was created, the Promoter did not disclose or divulge that allotments or agreements for sale in respect of the flats were made between the Promoter and the intending purchasers, if any. Learned Counsel argues that since the borrower failed to repay the loan amount, his client rightly approached the Debts Recovery Tribunal under Section 13(4) of the SARFAESI Act to recover its secured debt. According to learned Counsel, since the mortgage took place much prior to the Agreement for Sale or the date of booking in respect of the subject apartments, the decision of the Hon'ble Rajasthan High Court in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors. and the order dated 14th February, 2022 of the Hon'ble Apex Court in the Petition for Special Leave to Appeal (C) Nos.1861-1871/2022 (Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority and Ors.) will not apply to the factual matrix as placed by the Respondent No.1. The mortgage, by which repayment of the debt was secured by the Promoter, will not denote the Bank as an assignee. Learned Counsel submits that the complaint filed by the Respondent No.1 is hit by the doctrine of 'Caveat Emptor' meaning 'let the buyer beware'. In such context, learned Counsel argues that in the setting of the facts as portrayed by his client, the provisions of the Real Estate (Regulation and Development) Act, 2016 would not apply to the instant matter.

Mr. Gopal Krishna Lodha, Chartered Accountant and authorised representative for the Respondent No.1 submits that the Promoter Ideal Real Estates Private Limited registered the project namely 'Ideal Exotica' with the West Bengal Housing Industry

Regulatory Authority vide Registration No.HIRA/P/KOL/2018/000177. After registration of the project there were allotments of flats and Agreements for Sale between the Promoter and a number of Allottees in respect of the project. Mr. Lodha submits that since the Promoter transferred the project by way of mortgage in favour of the Appellant Bank to secure the loan amount taken by it from the Bank, the Promoter ought to have obtained prior written consent from two-third allottees and prior written approval of the Regulatory Authority. By not doing so, the transfer by way of mortgage is hit by Section 15 of the Real Estate (Regulation and Development) Act. Mr. Lodha vehemently argues that the learned Regulatory Authority by placing reliance on the Judgment of the Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India and the solemn order dated 14th February, 2022 of the Hon'ble Apex Court in the SLP(C) Nos. 1861-1871/2022, has rightly observed that in the event of conflict between RERA and SARFAESI Act, the provisions contained in the RERA Act would prevail and the Regulatory 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. The learned Regulatory Authority has also rightly observed that as an assignee the Appellant Bank has become the Promoter in respect of the flats of the project. On such score, Mr. Lodha submits that the interim Order as passed by the learned Regulatory Authority under Section 36 of the Act is sustainable in law and the appeal is liable to be dismissed.

Though the Promoter Ideal Real Estates Private Limited has been impleaded as a Respondent and it has represented itself before this Tribunal through a learned Advocate on some dates, but no pleading has been submitted on behalf of the Promoter. So, no written stand of the added Respondent No.2 Ideal Real Estates Private Limited is available before this Tribunal. However, an inkling of the stand of the Respondent No.2 surfaces from the principal Deed of Mortgage dated 10th June, 2019 executed and registered between Ideal Real Estates Private Limited and the Appellant Yes Bank Limited. By this instrument, the Promoter mortgaged 82 unsold flats as described in Schedule II of the Deed in favour of the Appellant Bank to secure the loan amount which the Promoter took from the Bank. Besides, there were 103 sold flats in the project as described in Schedule-III of the Deed. As it is evident, the unsold and sold flats as

depicted in the schedules all stood on 31.05.2019. This manifests by implication that while the Deed of Mortgage was executed and registered, there were allotment of flats in favour of a number of allottees and there were Agreements for Sale between the Promoter and the Allottees. But, in this Deed there is no indication of the registration of the project undertaken by the Promoter either with West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. However, the Deed of Conveyance between the Respondent No.1 Nippon Ispat Private Limited and the Promoter Ideal Real Estates Private Limited executed and registered on 28th October, 2021 shows that the project of the Promoter was registered with the West Bengal Housing Industry Regulatory Authority on 21st November, 2018 under Registration No.HIRA/P/KOL/2018/000177 under the relevant provision of the West Bengal Housing Industry Regulation Act, 2017. In this regard, it is pertinent to mention that the West Bengal Housing Industry Regulation Act, 2017 has been struck down as ultra vires the Constitution by the Hon'ble Apex Court in a decision dated 4th May, 2021 in the case of Forum for People's Collective Efforts (FPCE) Vs State of West Bengal. However, the Hon'ble Apex Court in this decision has observed that the striking down of WB-HIRA will not affect the registrations, sanctions and permissions previously granted under the legislation prior to the Judgment. In an order dated 12.05.2023 passed in the Petition for Special Leave to Appeal (C) No.16908 / 2022 (Saptaparna Ray Vs. District Magistrate and Collector, North 24 Parganas and Others), the Hon'ble Apex Court has held that this principle shall also apply to orders which were passed whether in original or in the course of the execution prior to the date of Judgment on 04.05.2021. All such orders shall be executed in accordance with law, as if they were issued under the RERA. In such legal position, the registration of the project of the Promoter under the provisions of the West Bengal Housing Industry Regulation Act, 2017 will continue to be governed under the Real Estate (Regulation and Development) Act, 2016. Similarly, any act or omission between the Promoter and the Allottees will also be guided by the provisions of the Real Estate (Regulation and Development) Act, 2016.

As submitted on behalf of the Appellant, since the Mortgage Deed was executed between the Promoter and the Appellant Bank on 10th June, 2019 much prior to the execution and registration of the Agreement for Sale between the Promoter and the

Respondent No.1, the legal principles enunciated by the Hon'ble High Court of Judicature for Rajasthan and the Hon'ble Apex Court in the case of Union Bank of India that the Real Estate (Regulation and Development) Act, 2016 would prevail over SARFAESI, will not be applicable to the facts of the instant matter.

It is the assertion of the Respondent No.1 that before transferring the project by way of mortgage by the Promoter in favour of the Appellant Bank, the Promoter did not obtain prior written consent from two-third allottees and prior written approval of the Authority as required under Section 15 of the Act. As we find, there is no pleading on behalf of the added Respondent No.2 Ideal Real Estates Private Limited to deny such assertion of the Respondent No.1.

As stated above, the project was registered on 21st November, 2018 under the West Bengal Housing Industry Regulation Act, 2017 and the Deed of Mortgage was executed and registered on 10th June, 2019 i.e. after the registration of the project. As indicated in the Deed of Mortgage, at the time of mortgaging the project in favour of the Appellant Bank, the project had 82 unsold flats and 103 sold flats.

Learned Regulatory Authority by the impugned interim Order has noted that the Appellant Bank by virtue of the mortgage has been an Assignee of the Promoter and thereby the Yes Bank Limited will be treated as a Promoter as defined in Section 2(zk) of the Act. The Hon'ble High Court of Judicature for Rajasthan in the case of Union Bank of India Vs. Rajasthan Real Estate Regulatory Authority has held at paragraph 30 of the Judgment as under:

"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 the RERA Act. The Advance Law Lexicon by P. Ramanatha Aiyar explains 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 express 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 become bankrupt".

It is the contention of the Appellant that by virtue of the Deed of Mortgage a charge was created on the project comprising the unsold flats therein with the sole object to secure the loan taken by the Promoter from the Bank. According to learned Counsel for the Appellant, this mortgage or charge for the purpose of securing repayment of the loan amount cannot be termed as transfer.

As observed by the Hon'ble High Court of Judicature for Rajasthan, by virtue of the mortgage, the Appellant Bank has been an Assignee of the Promoter. In such context, it will be apposite to refer to Section 58 of the Transfer of Property Act, 1882. As Section 58 of the Transfer of Property Act enjoins, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. This implies that by virtue of the registered Deed of Mortgage, transfer to the extent as stated in Section 58 of the Transfer of Property Act, has been effected in respect of the project of the Promoter. The project was registered under the West Bengal Housing Industry Regulation Act, 2017 on 21st November, 2018. As held by the Hon'ble Apex Court in the case of Forum for Peoples Collective Efforts (FPCE) Vs. State of West Bengal reported in (2021)3 SCC 599 and in the case of Saptaparna Ray in SLP(C) 16908 / 2022, the aforesaid registration of the project and all other legal acts in connection with the project will be guided by the Real Estate (Regulation and Development) Act, 2016 (RERA Act). Section 4 of the RERA Act, *inter alia*, says that while the Promoter shall make application to the Regulatory Authority for registration of the real estate project, he shall furnish the sanction plan, layout plan and specification of the proposed project or the phase thereof and the whole project as sanctioned by the Competent Authority, proforma of the Allotment Letter, Agreement for Sale and the Conveyance Deeds proposed to be signed with the allottees. Since the project was registered in November 2018 prior to the Deed of Mortgage in June 2019, the Yes Bank Limited ought to have enquired of the details of the project as uploaded either on the website of the West Bengal Housing Industry Regulatory Authority or West Bengal Real Estate Regulatory Authority. It impliedly appears from the pleading of the Respondent No.1 that at the time of execution and registration of the Deed of Mortgage, there were number of allotments of flats and

Agreements for Sale. Section 15 of the RERA Act regulates the transfer or assignment of the rights and liabilities of a Promoter in respect of a real estate project to a third party.

Section 15 of the RERA Act, *inter alia*, reads as under :

“15. The Promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to the third party without obtaining prior written consent from two-third allottees except the Promoter and without the prior written approval of the Authority:

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be in the real estate project made by the erstwhile Promoter”.

As observed by the Hon'ble High Court of Judicature for Rajasthan in Union Bank of India and in view of discussion on Section 58 of the Transfer of Property Act, the Promoter transferred / assigned the project comprising the unsold flats to the Appellant Yes Bank Limited. No iota of documentary evidence has been adduced from the side of the Appellant Bank to show that prior to transfer or assignment of the project in favour of the Bank, the Promoter obtained prior written consent from two-third allottees as well as the prior written approval of the West Bengal Housing Industry Regulatory Authority which had then legal entity. As a consequence thereof, the deed of mortgage shall not have any prejudicial effect upon the allottee or allottees or the buyers of the flats. Be that as it may, even if the transfer was effected lawfully, such transfer or assignment shall not affect the allotment or sale of the apartments as per the proviso to Section 15 of the RERA Act. In such connection, it will be profitable to refer to Section 11(h) of the RERA Act which provides that after the Promoter executes an Agreement for Sale for any apartment, not mortgage or create a charge on such apartment 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. All these legal provisions clearly demonstrate that transfer or assignment of a project by a Promoter to a third party or any mortgage or charge in respect of any flat of the project, shall not, in any way, affect the rights of an allottee or a buyer of a flat. On the other hand, Insolvency and Bankruptcy Code, 2016 also protects the interests of an allottee from whom any amount is raised under a Real Estate Project. As per Section 5(8) of the Code as amended vide

Amendment Act 26 of 2018 with effect from 06.06.2018, the amount invested by an allottee shall be termed as financial debt and such financial debt is recoverable by an allottee under the various remedial measures as provided in the Code. Therefore, viewed from any angle, the rights and interests of an allottee are protected by different statutes.

Admittedly, the Appellant Bank approached the Debts Recovery Tribunal-1, Kolkata by filing an application registered as O.A. No. 2 of 2024 under Section 13(4) of the SARFAESI Act seeking measures to recover its secured debt by taking possession of the secured assets of the borrower for realising the secured assets and the Debts Recovery Tribunal passed order as sought for by the Appellant Bank.

It is argued on behalf of the Appellant that if the Respondent No.1 became aggrieved by the order passed by the Debts Recovery Tribunal, it ought to have approached the same Debts Recovery Tribunal under Section 17 of the SARFAESI Act. Section 17(1) of the SARFAESI Act says that any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of the Section 13 taken by the secured creditor or his authorised 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 45 (forty-five) days from the date on which such measure had been taken.

The legal proposition as reflected above clearly demonstrates that despite any mortgage or charge created in respect of a project, the rights of an allottee shall remain unaffected. However, the Hon'ble Apex Court in disposing of the Special Leave to Appeal (C) Nos.1861-1871 of 2022 challenging the Judgment of the Hon'ble High Court of Judicature for Rajasthan passed in the Union Bank of India, by order dated 14th February, 2022, has held that in the event of conflict between RERA and SARFAESI Act, the provisions contained in RERA would prevail and the RERA Authority has the jurisdiction to entertain a complaint by an aggrieved person against the Bank as secured creditor if the Bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act.

Therefore, in view of the above legal proposition, the learned Regulatory Authority was within legal domain to entertain the complaint of the Respondent No.1

challenging the order passed by the Debts Recovery Tribunal under Section 13(4) of SARFAESI Act.

As discussed on the provisions under Section 15 of the RERA Act, the transfer or assignment of the project by way of mortgage is hit by law sans permission from the two-third of the allottees and the WBHIRA or WBRERA. Even if it is assumed that this transfer or assignment is lawful in that event also, the Appellant Bank put into the shoes of the Promoter as an assignee or transferee shall be required to independently comply with all the pending obligations under the provisions of the RERA Act or the Rules and Regulations made thereunder and the pending obligations as per the Agreement for Sale entered into by the erstwhile Promoter with the allottees under Section 15(2) of the RERA Act.

Now, it is axiomatic, in view of the legal position as above, while the rights of an allottee or the flat buyer are protected under the provisions of the RERA Act, no question arises that an allottee or a flat buyer would approach the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act.

Therefore, we do not find any illegality or impropriety in the impugned interim Order as passed by the learned Regulatory Authority.

We find that the learned Regulatory Authority passed the interim Order in exercise of power under Section 36 of the RERA Act on urgent measure before exchange of affidavits between the parties. The learned Regulatory Authority, however, directed the parties to exchange their respective affidavits within a stipulated period. That being so, the learned Regulatory Authority shall have to dispose of the complaint after exchange of the affidavits between the parties and hearing the parties. In such view of the matter, we note herein that the interim Order passed by the learned Regulatory Authority shall be without prejudice to the rights and contentions of the parties.

We feel that for proper adjudication of the complaint, the learned Regulatory Authority may be directed to add the Promoter as a Respondent to the complaint.

In view of the above, the appeal is dismissed on contest. Consequently, the application for stay having no merit is also dismissed.

No order as to costs.

The interim Order passed by the learned Regulatory Authority is hereby affirmed and this order will continue till disposal of the complaint.

The learned Regulatory Authority is directed to add the Promoter Ideal Real Estates Private Limited as a Respondent to the complaint and serve notice upon it.

The added Respondent-Promoter shall be given opportunity to file affidavit to place its stand.

The learned Regulatory Authority shall dispose of the complaint as expeditiously as possible.

Let a copy of this Judgment be communicated to the respective parties through their learned Advocate and the authorised representative as well as the learned Regulatory Authority.

Sd/-

JUSTICE RABINDRANATH SAMANTA

Chairperson

West Bengal Real Estate Appellate Tribunal

Sd/-

GOUR SUNDAR BANERJEE

Judicial Member

West Bengal Real Estate Appellate Tribunal

Sd/-

Dr. SUBRAT MUKHERJEE

Technical/Administrative Member

West Bengal Real Estate Appellate Tribunal

By Order of WBREAT

Dated: 09.01.2025

Authorised Signatory