OREAT Appeal No.49/2023

24)30.06.2025 The appeal is taken up through hybrid mode.

2) We have already heard Mr.P.C.Rath, learned counsel appearing for the appellant and Mr. M.Agarwal, learned counsel appearing for the respondent no.1 through virtual mode.

3) Aggrieved over the order dtd. 21.01.2023 of the Odisha Real Estate Regulatory Authority passed in Complaint Case No.221/2022, the appellant who was the respondent no.5 therein has filed this appeal praying to either set aside or modify the same and to remand the matter back to the learned Regulatory Authority for a fresh order. The respondent no.1 of this appeal was the complainant and the respondent nos.2,3,4 and 5 were the respondents no.1,2,3 and 4 respectively in the said complaint case.

4) The facts and circumstances leading to the filing of the present appeal are as follows :

On 8.7.2022 the respondent no.1 of this appeal as complainant filed the aforesaid complaint case before the learned Regulatory Authority stating that, intending to purchase a flat in the project 'Ganapati Homes' on plot no.788/1444 in khata no.233/144 of mouza-Sampur, Bhubaneswar, she contacted the respondent no.1-promoter. Agreeing to purchase flat no.64 (Type-D) of the said project with a super built up area of 1450 square feet for a cost of Rs.35,67,000/- together with a cost of Rs.1,50,000/- for car parking space and also other charges, the complainant deposited an amount of Rs. 12,00,052/- on 26.10.2012 and Rs.1,54,635/- on 19.7.2013. A sale agreement was executed between the complainant and the respondent no.1-promoter relating to the aforesaid flat on 19.7.2013 and on the same

day allotment letter in respect of it was also issued in her favour. As per the sale agreement, the respondent no.1 was to complete the apartment in all respect and deliver possession thereof to the buyer within 36 months from the date of agreement. According to the terms and conditions of the sale agreement, when the complainant had paid an amount of Rs.41,51,905/- to the respondent no.1-promtoer, the latter gave an option to the former to take an alternative flat i.e. Flat No.62 with an additional cost of Rs.14,00,000/- and accordingly the complainant paid an amount of Rs.5,00,000/- each on 21.6.2021 and 29.6.2021 through NEFT. The complainant alleged that inspite of receiving an amount of Rs.51,51,905/- in total from her the respondent no.1-promoted failed to complete her flat in all respect within the stipulated period. The respondent no.1-promoter gave a letter to the complainant agreeing to pay her compensation @ Rs.15,000/- per month for late delivery of possession of the flat w.e.f. 1.1.2017. However, since 1.1.2017 till April, 2020 i.e. for a period of 40 months though the respondent no.1 was required to pay Rs.6,00,000/- to the complainant towards interim compensation but did not give her a single pie. The complainant has further alleged that inspite of her several approaches to the respondent no.1-promoter to complete her flat and to execute as well as register the sale deed in respect of it and also to deliver its possession in her favour, there was no response from the respondent nos.1 to 4. The complainant claimed that due to non-delivery of her flat in time, she sustained financial loss by paying house rent since August, 2016. The complainant further alleged that the demand for Rs.1,50,000/- towards parking space cost by the respondent no.1-promoter was also illegal and a contravention of Section 17 of the RERA Act as parking space being a part of common

areas cannot be sold to any individual allottee and also no extra charge for the same can be taken by the promoter. The complainant further alleged that the respondents no.1 to 4 having not given her possession of her flat are also to incur a penalty of 5% of the total cost of the project. The complainant also claimed interest on the amount paid by her for the delay in completion of the flat and its delivery of possession from the dates of her respective deposits till actual delivery of possession of the flat. The complainant further alleged that while the matter stood thus, she came to know from the publication dtd. 7.3.2020 in the English daily "The Statesman" that e-auction for sale of immovable/movable properties of the respondent no.1-promoter including the project land of an area of Ac.0.60 out of an area of Ac.2.00. The complainant has claimed that the project is an on-going one as no completion certificate and occupancy certificate in respect of it have been issued. The complainant has expressed her surprise as to how could the respondent no.1-promoter mortgaged the project land to the respondent no.5-Bank when the same bank has granted loan in her favour in respect of the flat in question and the respondent no. 1-promoter has issued no objection to it. So with the aforesaid claims and allegations, the complainant inter alia prayed to issue directions to the respondent no.1-promoter to deliver possession of the flat in question to her, to pay her quarterly compound interest at the rate of 12% on her deposited amount till delivery of possession of the flat to her, to permanently restrain the respondent no.1-promoter to alienate her allotted flat to any outsider, to permanently restrain the respondent no.5-bank from putting the project land in auction sale, to pay her Rs.15,000/- per month from August, 2016 till the actual delivery of possession of her flat towards the house rent paid

by her together with a compensation of Rs.2,00,000/- for mental harassment and a litigation cost of Rs.20,000/- and also to provide her completion certificate, occupancy certificate and other statutory documents relating to the project.

Pursuant to the summons issued by the learned Regulatory Authority, the respondents no.1 to 4 did not appear and accordingly were set ex parte. The respondent no.5-bank appeared through its counsel on 10.10.2022 and filed its written show cause on 5.12.2022 submitting that the respondent no.5 is the true owner of the project land as the sale agreement of the complainant with the respondents no.1 to 4 is an unregistered one and the complainant has not disputed the mortgage of the project land and the loan advanced by the respondent no.5. Moreover, the complainant has no right, title and interest over the property as no sale deed in respect of it has so far been executed in her favour by the respondent no.1. It is claimed by the respondent no.5-bank that it has sanctioned a term loan of Rs. 4.60 crores for construction of a house building project on the project land in favour of the respondent no.1 subject to certain terms and conditions and as per the said terms, the respondent no.1 has created a valid equitable mortgage in favour of the respondent no.5 in respect of the project land on 8.2.2014. The respondent no.5 has claimed that it being a secured creditor has every right to put the secured asset i.e. the project land to auction for recovery of the loan dues. The respondent no.5 further contended that after the loan amount was declared NPA on 29.11.2016 it issued a demand notice u/s 13 (2) of the SARFAESI Act,2002 on 5.12.2016 to the respondent no.1 asking it to pay Rs. 4,09,59,761.95 within a period of sixty days from the date of the notice, but inspite of the receipt of

the said demand notice, the respondent no.1 failed to pay the outstanding dues resulting in the respondent no.5 issuing possession notice u/sec. 13 (4) of the SARFAESI Act, 2002 and publishing the same in the daily news paper. The bank also filed a recovery suit under the RDB Act, 1993 against the respondent no.1 and others vide O.A. No.166 of 2018 in the Debts Recovery Tribunal, Cuttack on 28.2.2018 for recovery of a due of Rs.3,72,37,455.90 and other reliefs and the same is pending for hearing. Claiming that it has already taken physical possession of the project land pursuant to the order dated 24.6.2019 passed by the District Magistrate and Collector, Khordha in BMC No.41/2017 under section 14 of the SARFAESI Act and that the said order has still not been challenged by the aggrieved party, the respondent no.5 has reiterated its claim that the sale agreement dtd.19.7.2013 between the complainant and the respondent no.1 being an unregistered one and no sale deed having been executed and registered in her favour in respect of the flat in question, the complainant has no right, title and interest over the mortgaged property and as such the relief claimed against the respondent no.5 is not at all tenable in the eye of law. Further claiming that it being the secured creditor and the mortgagee in respect of the project land is authorized to sell it for realization of the loan dues, that the proceedings initiated so far by it under the SARFAESI Act have not been challenged either by the complainant or by the respondents no. 1 to 4, that Section 35 of the SARFAESI Act, 2002 will override the provision of the RERA Act, 2016, that the dues of the Bank being secured debt will have priority over the mortgaged property, that the DRT, Cuttack only has the exclusive jurisdiction to adjudicate the issue involved and that other courts and tribunals have no jurisdiction to decide the validity

and legality of the mortgage, the respondent no.5 has prayed for dismissal of the complaint with costs.

The learned Regulatory Authority on perusal of the pleadings of the complainant and the respondent no.5 framed five points for consideration and on hearing both the parties as well as going through the documents filed by them passed the impugned order as follows :

> "The case is allowed on contest against the Respondent no.5 and ex parte against the other Respondents without cost. The respondent no.5 is directed –
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> 1. (i) to act as promoter in place of Respondent Nos.1 to 4 and to collect all dues available to the promoter for the purpose of completing the project and to secure interest of the complainant and other allottees, who have invested money in the project,
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> (ii) to discharge all the responsibilities of the promoter of the project as per Sections-11 to 18 of the Real Estate (Regulation & Development) Act, 2016;
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> (iii) to collect all balance consideration amount from the allottees for the purpose of completing the project and to handover possession of the same to the complainant and the other allottees;
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> (iv) to take legal action against the Respondent Nos.1 to 4 to recover the amount collected by them from the allottees on the basis of the agreement executed between them and the allottees;
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> 2. The Respondent no.5 may continue the case before the Debt Recovery Tribunal to recover the debt amount from the Respondent no.1 without putting the project land into auction;
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> 3. The Respondent No.1 is directed to pay interest @ 9.70% per annum on the amount of Rs.51,51,905/- payable from 20.7.2016 till the delivery of possession;
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> 4. The parties are directed to comply with the order as above failing which, the order shall be enforced as per law."

5. In the hearing of the appeal, the learned counsel for the appellant has submitted that, the learned Regulatory

(VII)

Authority has erred in holding the appellant-bank as an assignee of the respondent no.2-promoter on the ground that the appellant has taken possession of the mortgaged land whereas the appellant has got every right as a mortgagee to enforce its security to recover its dues against the respondent no.2 and for the same reason it should not have been held that the appellant has stepped into the shoes of the respondent no.2-promoter. It is further submitted that the unregistered agreement to sell between the respondent no.1 and the respondent no.2 and the mortgage between the appellant and the respondent no.2 are two separate transactions and therefore only because the agreement to sell was executed prior to the transaction of mortgage, it is erroneous on the part of the learned Regulatory Authority to hold that the home buyers including the complainant have the prior charge on the property. It is further submitted that the transaction of mortgage between the respondent no.2 and the appellant-bank is a registered one but the agreement to sell between the respondent no.1 and respondent no.2 being an unregistered one is not enforceable in the court of law. Drawing the attention of this Tribunal to the reliance of the learned Regulatory Authority on the case law of Union Bank of India vrs. Rajasthan Real Estate Regulatory Authority and Others, the learned counsel for the appellant has pointed out that in the said case the promoter had created charge in favour of the bank by creating security interest of 19 flats including the 9 flats which were already sold, but in the present case the project land has been mortgaged for funding the project without creating security interest in any of the allotted flats. Moreover, in the said case the Hon'ble Apex Court has made it very clear that, RERA would not apply in

relation to the transaction between the borrower and the bank or other financial institution where security interest has been created by mortgaging the property prior to the introduction of the Act unless it is found that the creation of such mortgage or such transaction is fraudulent or collusive. In the present case there is no element of fraud in the mortgage transaction and security interest having been created by mortgage prior to the introduction of the RERA Act, it is not applicable. The learned counsel for the appellant has further contended that the learned Regulatory authority has not assigned any reason in support of its conclusion that the appellant and the respondent no.2 have colluded with each other in creating the mortgage. Referring to a recent observation of Hon'ble Delhi High Court, the learned counsel for the appellant has asserted that, it is not the bank's responsibility to get the project completed and the bank cannot assume the role of a builder to complete the project. It is further contended that the impugned order is in violation of the Banking Regulations Act,1949 as Section 6 (2) of the Act prohibits banks from doing any business other than what is specified therein. The learned counsel for the appellant has referred to the decision of Hon'ble High Court of Orissa in the case of Chandrasekhar Patra vs. Jitan Manki reported in OLR 2017 (1) page-287 wherein it has been observed that, once the property is mortgaged as a collateral security, failure of the satisfaction with the financier, it becomes automatic on the part of the financer to deal with the property. Once the loanee fails to discharge the loan, the bank becomes the owner of the mortgaged property. With the aforesaid contentions, the learned counsel for the appellant has termed the impugned order as bad in the eye of law and has

accordingly made the prayer as mentioned earlier in paragraph-3.

6) On the hand learned counsel for the respondent no.1 has asserted that, it is clear from the observation of the Hon'ble Supreme Court of India in the case of Union Bank of India vs. Rajsthan Real Estate Regulatory Authority and Others that, once the bank takes action for enforcing its security interest in terms of Section 13 (4) of the SARFAESI Act, the secured creditor enters into the shoes of the borrower/ promoter for all purposes as there is an assignment of statutory rights in favour of the lender and thus the bank becomes an assignee and falls under the definition of 'promoter' as provided under section 2 (zk) of the RERA Act. It is further submitted that, the sale agreement between the respondent no.1 and the respondent no.2 having been made on 19.7.2013 i.e. before the mortgage transaction between the appellant-bank and the respondent no.2-promoter on 8.2.2014, a right was already created in favour of the respondent no.1 and therefore the appellant–bank and the respondent no.2 could not have entered into the subsequent mortgage transaction. On this ground the mortgage is fraudulent and collusive particularly when no consent of the respondent no.1 was obtained before mortgaging the project land. The learned counsel for the respondent no.1 has claimed that as per Section 49 of the Registration Act, 1908, an unregistered agreement to sell is admissible in evidence. The learned counsel for the respondent no.1 has pointed out to the fact that the appellant-bank in spite of knowing that the respondent no.2-promoter had negotiated with the prospective buyers to sell the flats and collect money, has accepted the mortgage and sanctioned a huge sum to the

respondent no.2-promoter and this clearly shows the appellant-bank to have colluded with respondent no.2-promoter in creating the mortgage. The flat buyers therefore cannot be left remediless. The learned counsel for respondent no.1 has stressed on the operative part of the impugned order wherein it has been held that the bank may continue its case before the DRT to recover the debt amount from the builder without putting the project land into auction and this finding according to him has safeguarded the interest of the bank as well as the flat buyers. With the aforesaid contentions, the learned counsel for the respondent no.1 has prayed to dismiss the appeal for being without any merit.

7) The undisputed facts amongst the parties emerging from the pleadings of the respondent no.1 and the respondent no.5 in the complaint case and documents relied on by them such as the copies of the agreement to sell, allotment letter, money receipts, letter of sanction of term loan, notice u/sec. 13 (2) of the SARFAESI Act and order dated 24.6.2019 of the District Magistrate, Khurda u/Sec. 14 of the SARFAESI Act are :

i)The respondent no.1-allottee and the respondent no.2-promoter had entered into an agreement to sell in respect of flat no.64 (Type-D) in the 6th floor of the project 'Ganapati Homes' on Plot No.788/1444 in Khata No.233/144 of mouza Sampur, Bhubaneswar on 19.7.2013.

ii)The initial cost of the flat agreed to was Rs.35,67,000/- besides the car parking space charge of Rs.1,50,000/-.

iii)The respondent no.2-promoter had agreed to complete the project within 36 months from the date of the plan approval by Bhubaneswar Development Authority.

iv) Subsequently the respondent no.2-promoter offered the respondent no.1-allottee an alternative flat in the same project i.e. Flat no.62 for an additional consideration price of Rs.14,00,000/-. The respondent no.1 agreed to the offer.

v)So far the respondent no.1 has paid an amount of Rs.51,51,905/- in total.

vi) The project is still not complete for the respondent no.1 to take delivery of possession of the flat in question from the respondent no.2.

vii) After execution of the sale agreement with the respondent no.1 on 19.7.2013, the respondent no.2-promoter has mortgaged the project land to the appellant-bank on 8.2.2014 for a loan of Rs.460.00 lakhs.

viii) Due to failure on the part of the respondent no.2-promoter to repay the outstanding loan amount of Rs.40959761.95 , the appellant-bank after declaring the loan account as non-performing asset and issuing notice to it u/sec. 13 (2) of the SARFAESI Act, 2002 has taken recourse to Section 13 (4) of the said Act by obtaining permission of the District Magistrate & Collector, Khordha u/sec. 14 of the said Act vide order No.278 dated 24.6.2019 in BMC No.41/2017 for taking physical possession of the project land and publishing the auction sale notice in respect of the project land in the English daily newspaper 'The Statesman' dated 7.3.2020.

ix) The project being not completed till now is certainly covered under the RERA Act.

8) The respondent no.2-promoter and its Directors (Respondents No.3,4 and 5) had not appeared in the complaint case proceeding to contest it and the impugned order has been passed in absence of them. Having failed to complete the project and unable to give possession of the flat

to the respondent no.1 in accordance with the terms of the agreement for sale, the respondents no.2,3,4 and 5 are undoubtedly liable to pay interest to the respondent no.1, who does not intend to withdraw from the project, on the payments received from her, for every month of delay, till the handing over of the possession, in accordance with the proviso to section 18 (1) (b) of the RERA Act, at the rate prescribed in Rule 16 of the ORERA Rules, 2017 i.e. SBI highest Marginal Cost of Lending Rate plus two per cent.

In normal circumstance, on adjudicating a complaint involving grievance of an allottee with regard to the promoter's failure to complete and deliver possession of his/her allotted apartment flat as per the terms of the sale agreement, the Regulatory Authority on proof of such failure would have passed a simple order directing the promoter to deliver possession of the flat to the allottee together with interest at the aforesaid prescribed rate for every month of delay on the amount received by him in respect of the flat till the delivery of its possession. However, in the present case the project having been mortgaged by the respondent no.2-promoter to the appellant-bank subsequent to the execution of sale agreement with the respondent no.1-allottee and it having failed to repay the loan, the mortgagee i.e the appellant-bank has taken over the possession of the project land and has also taken step for its auction sale by advertisement in the daily news paper. So, it is for this reason, the learned Regulatory Authority in the impugned order dated 21.01.2023 has placed the appellant-bank in the place of respondents no.2 to 5 to discharge all the responsibilities of the promoter to complete the project and to secure the interest of the respondent no.1 and other allottees.

(XIII)

The learned Regulatory Authority in the impugned order has held that prior to the mortgage transaction between the respondent no.2-promoter and the appellant-bank on 08.02.2014, the respondent no.2 had already entered into agreement for sale with the respondent no.1 and other allottees and so right is created in favour of the respondent no.1 and other allottees to purchase the proportionate land and building raised thereon as per the sale agreement. Such a right being created prior to creating mortgage in favour of the appellant-bank, the respondent no.1 and other allottees shall have first charge over the same property. It is categorically held by the learned Regulatory Authority that, Bank has stepped into the shoes of the promoter after creation of mortgage and Bank will have the authority to proceed to recover the amount leaving the extent of the property which was earlier negotiated with the allottees for the purpose of sale. The appellant-bank has challenged these findings of the learned Regulatory Authority on the ground that, it being the secured creditor is within its right to enforce its security under the provisions of the SARFAESI Act to recover its dues against the respondent no.2-promoter and taking possession of the secured asset is one of the provisions of law to which the appellant is entitled. The appellant-bank has therefore claimed that, it is neither an assignee of the respondent no.2-promoter nor has stepped into its shoes. It has also contended that the respondent no.1 and other allottees cannot have a prior charge on the mortgaged property as their sale agreements with the respondent no.2-promoter being unregistered ones are not enforceable in the court of law whereas the mortgage of the project land to the appellant-bank by the respondent no.2-promoter is a registered transaction and hence valid.

(XIV)

In the case of Union Bank of India versus Rajastan Real Estate Regulatory Authority and Others decided on 14.12.2021, which the learned Regulatory Authority has also relied on in the impugned order, the Division Bench of the Hon'ble High Court of Rajasthan in analysing the term "assignee" have discussed Section 13 of the SARFAESI Act, 2002 in detail and held as follows:-

> **"33.** In terms of the SARFAESI Act and particularly sec. 13, once a borrower is unable to repay the debt and the asset is classified as non-performing asset, it is open for the secured creditor to enforce the rights without intervention of the court. After issuance of notice under sec. 13 (2) and disposing of objections of the borrower in terms of Section 13 (3A), a secured creditor could proceed to take steps as envisaged in sub-section (4). These measures which a secured creditor can take include taking possession of the secured asset including right to transfer by way of lease, assignment or sale for realising the secured asset, to take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset....."
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> **35.**Clauses (a), (b) and (c) of sub-section (4) of Section 13 vest power in the secured creditor to take all steps as the borrower himself could take in relation to the secured asset. Clause (d) goes a step further and enables the bank to recover its dues directly from a debtor or the borrower who has acquired any of the secured assets. For all purposes thus the secured creditor steps in the shoes of the borrower in relation to the secured asset. This is thus a case of assignment of rights of the borrower in the secured creditor by operation of law. In other words the moment the bank takes recourse to any of the measures under sub-section (4) of Section 13, it triggers statutory assignment of right of the borrower in the secured creditor. Till this stage arises the bank or financial institutions in whose favour secured interest may have been created may not be in isolation in absence of the borrower be amenable to the jurisdiction of RERA. However the moment the bank or the financial institution takes recourse to any of the measures available in sub-section (4) of Section 13 of the SARFAESI Act, RERA authority would have jurisdiction to entertain the complaint filed by an aggrieved person."

The above mentioned observation of the Hon'ble High Court of Rajasthan finds approval from the **order dated 14.02.2022 of the Hon'ble Supreme Court of India in the Petition for Special Leave to Appeal (Civil) Nos.1861-1871 of 2022** filed by the Union Bank of India. The learned Regulatory Authority has therefore rightly held the appellant-Bank as an assignee of the respondent no.2-promoter after the appellant has taken possession of the mortgaged project land. The appellant-bank after taking recourse to Section 13(4) of the SARFAESI Act has certainly stepped into the shoes of the respondent no.2-promoter, who is the borrower, in relation to the secured asset. So, the contention of the appellant-bank that it is not an assignee of the respondent no.2-promoter but only in the capacity of the mortgagee has every right to enforce its security to recover its dues is not acceptable.

9. The contention of the appellant-Bank that the agreement for sell dated 19.07.2013 between the respondent no.1-allottee and the respondent no.2-promoter being an unregistered one is not enforceable in the court of law and therefore the mortgage of the project land to it by the respondent no.2-promoter even if a subsequent transaction, but being a registered one will certainly override the sale agreement is not acceptable in view of the fact that, the agreement for sale being of the date 19.7.2013 is not expected to be registered in terms of Section 13 (1) of the RERA Act. Even under Section 17 of the Registration Act, 1908 its registration was not an absolute requirement considering the fact that possession of the flat in question has not been delivered so far. So, the agreement to sell dated 19.7.2013 is a quite lawful transaction.

10) As already mentioned in para-7, the project in question being still not a completed one is definitely under the fold of the RERA Act. The respondent no.1 has filed the complaint case seeking redressal of her grievance under the RERA Act relating to the flat allotted to her on the project land, whereas the appellant-bank has claimed its right as a secured creditor under section 13 of the SARFAESI Act over the project land as a whole. It is the categorical plea of the appellant-bank in the complaint case that in view of section 35 of the SARFAESI Act, 2002, the Act will override the provisions of the RERA Act, 2016. In this regard, in their order dated 14.12.2021 the Hon'ble High Court of Rajasthan in the case of Union Bank of India Vrs. Rajasthan Real Estate Regulatory Authority and others (Supra) have referred to the settled law in the decision of **Hon'ble Supreme Court of India in the case of Bikram Chatterji and Others versus Union of India and Others reported in (2019) 19 SCC-161** that, in the event of conflict between the RERA Act and the SARFAESI Act, the provisions contained in the RERA Act would prevail. However, in dealing with the Hon'ble Supreme Court's decision in the Bikram Chaterji case (Supra), the Hon'ble High Court of Rajasthan has put a rider by observing that, RERA would not apply in relation to the transaction between the borrower and the banks and financial institutions in cases where security interest has been created by mortgaging the property prior to the introduction of the Act unless and until it is found that the creation of such mortgage or such transaction is fraudulent or collusive.

11) As regards the claim of the appellant-Bank that no fraud or collusion is involved in the mortgage transaction dated 8.2.2014, it is to be noted that the respondent no.2-promoter had mortgaged the project land to the appellant-

Bank after its sale agreement with the respondent no.1-allottee but nowhere in its show cause to the complaint the appellant-Bank has taken the plea that at the time of entering into the mortgage transaction with the respondent no.2-promoter it was unaware of the fact of sale agreement dated 19.07.2013 between the respondent no.1 allottee and respondent no.2-promoter because of its suppression by the latter. Rather, the appellant-bank's claim that the mortgage transaction even if has been entered into after the sale agreement but being a registered transaction certainly overrides the unregistered sale agreement clearly indicates that at the time of entering into the mortgage transaction on 8.2.2014 it had ignored the existing sale agreement dated 19.07.2013 for its being an unregistered one. It is quite unlikely that, before sanctioning a huge loan amount like Rs.460 lakhs to the respondent no.2-promoter the appellant-bank had not ensured whether the project land was free of prior charges or agreements or any third party had no right over it prior to the mortgage. So when the appellant-Bank knowingly fully well that the respondent no.2-promoter had entered into a sale agreement with the respondent no.1 had still sanctioned the loan of Rs.460 lakhs to the respondent no.2-promoter on an equitable mortgage of the project land thereby acting in detriment to the interest of the respondent no.1-allottee, there remains no doubt that the transaction between the appellant-Bank and the respondent no.2-promoter was a collusive one. Hence, the RERA Act would apply to the transaction between the appellant-bank and the respondent no.2-promoter even though security interest has been created by mortgaging the project land on 8.2.2014 i.e. prior to the introduction of the Act.

12) The learned counsel for the appellant-Bank has tried to establish that the case law of Union Bank of India versus Rajasthan Real Estate Regulatory Authority and Others (Supra) is not applicable to the present case because in the said case the promoter had created charge in favour of the Bank by creating a security interest of 19 flats including the 9 flats which were already sold, whereas in the present case only the project land has been mortgaged for funding the project but no security interest has been created in respect of any of the allotted flats. However, the contention of the learned counsel for the appellant-Bank appears to be misconceived as it is not the kind of real estate property the Hon'ble Court has emphasized upon. The subject matter of a transaction under Section 13 of the SARFAESI Act does not exclude landed property from the purview of the security. The appellant-bank should take note of the fact that, even in a project involving apartment flats, an allottee apart from acquiring title in respect of his or her flat after execution and registration of the conveyance deed, is also transferred the undivided proportionate title in the common areas of the project land. Therefore, it is immaterial whether the subject matter of the mortgage transaction is only a project land or the flats constructed on it.

13) Hon'ble Supreme Court of India in the aforesaid SLPs have confirmed the entire findings of the Hon'ble High Court of Rajasthan in the case of Union Bank of India versus Rajasthan Real Estate Regulatory Authority and Others (Supra), but with a clarification to Para-36(v) of the order dated 14.12.2021 that, RERA 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 but

this is applicable in a case where proceedings before the RERA are initiated by the home buyers to protect their rights. In the present case it is already held that the appellant-Bank has put the project land under auction sale by taking recourse to Section 13(4) of the SARFAESI Act and definitely the respondent no.1-home buyer has filed the Complaint Case No.221/2022 to protect her rights. So, the learned Regulatory Authority has the jurisdiction to entertain the present complaint of the respondent no.1 against the appellant-bank.

14) In view of the discussions made in the preceding paragraphs Nos.7 to 13, we come to the conclusion that, the appellant-Bank after taking recourse to Section 13(4) of the SARFAESI Act i.e. obtaining physical possession of the project land and publishing advertisement in the newspaper for its auction sale is certainly an assignee of the respondent no.2-promoter and has stepped into its shoes. The RERA Act which prevails over the SAFAESI Act will apply to the mortgage transaction dated 08.02.2014 in spite of the fact that security interest has been created by mortgaging the project land prior to the introduction of the RERA Act as the creating of such mortgage is the result of collusion between the appellant-Bank and the respondent no.2-promoter. It is further held that ORERA has the jurisdiction to entertain the present complaint case by the respondent no.1 against the appellant-Bank as a secured creditor as the appellant-Bank has taken recourse to the provision contained in section 13(4) of the SARFAESI Act and the respondent no.1 has initiated the proceeding to protect her rights.

15) However, as the appellant-Bank has challenged the enforceability of the impugned order and more particularly the directions to it made in the operating portion of the impugned order at Para-15 (1) (i), (ii), (iii) and (iv). The appellant-bank

has drawn the attention of this Tribunal to Section 6 of the Banking Regulations Act, 1949 submitting that as per sub-section (2) of it no banking company shall engage in any form of business other than those referred to in sub-section (1), whereas the forms of business specified in sub-section (1) in which banking companies may engage do not include the functions in para-15 (1) (i), (ii) & (iii) which the appellant-bank has been directed to do. According to the appellant-bank, the aforesaid directions of the learned Regulatory Authority are violative of the Banking Regulations Act, 1949. It is however to be noted that, the directions of the learned Regulatory Authority to the appellant-bank as contained in para-15 (i), (ii), (iii) & (iv) of the impugned order is on the basis of its holding the appellant-bank to have stepped into the shoes of the respondent no.2-promoter in respect of the project on taking recourse to section 13 (4) of the SARFAESI Act and therefore cannot be termed as illegal.

Of course, banks being financial institutions and not construction agencies with technical or managerial capacity to build real estate projects, practical issues are likely to arise. So we think it appropriate in the facts and circumstances of the case to issue the following directions :

i) The direction of the learned Authority in para-15 (2) and (3) of the impugned order are hereby confirmed.

ii) As regards the directions of the learned Regulatory Authority in para-15 (1) (i), (ii), (iii) and (iv) of the impugned order are concerned, the same are modified as follows :

(a)Like its obligation under Section 8 of the RERA Act in the event of lapse of the registration or on revocation of the registration under the Act, the

ORERA may consult the appropriate Government to carry out the remaining development works of the project by the competent authority or by the association of allottees (if such association exists), or in any other manner as may be determined by the ORERA which may include appointment of an external developer through public tender with consent of the respondent no.1 and other allottees in consultation with the appellant-bank.

(b)The appellant-bank shall be without any entitlement to resort to section 13 (4) of the SARFAESI Act in respect of the interests of the respondent no.1 and other investing allotees in the project.

(c) The appellant-bank being the collusive creditor and the assignee of respondent no.2-promoter shall extend all co-operation to the ORERA in enforcing all the steps as specified by the learned Regulatory Authority in para 15 (1) of the impugned order for completing the project and securing possession of the flats to the respondent no.1 and other allottees.

With the above mentioned directions and modifications, the appeal is disposed of on contest against the respondent no.1 and ex parte against the respondents no.2 to 5.

Send an authentic copy of this order alongwith the record of the complaint case to the learned Regulatory Authority for information and necessary action. Also send a

copy of this order each to the appellant and the respondent no.1.

Justice P.Patnaik
Chairperson

Shri S.K.Rajguru
(Judicial Member)

(Dr. B.K.Das)
(Tech./Admn. Member)

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