RERA Dossier 2019-20

– insight to various judicial precedents set by the RERA of various States

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Continued from April 2021 issue...

- **Haryana RERA**
  - **Kedar Singh Bhadauria vs. Ansal Housing and Construction Limited**

    The Haryana RERA has taken a stern view against the developer for failing to deliver the possession on the due date even after availing a 6 months' extension. Haryana RERA directed the developer to pay interest at the prescribed rate for every month's delay from the due date of possession till the actual date of possession.

  - **Sandhya Goel vs. Today Homes and Infrastructure Private Limited**

    In the instant case, the Haryana RERA clarified that the relief of interest cannot be granted from the date of booking as Section 18 of the Act envisages interest only for the period of delay in handing over the possession.

- **Delhi RERA**
  - **Devender Kumar vs. M/s. Parsvnath Realcon Private Limited**

    Delhi RERA held that an allottee cannot be compelled to wait indefinitely for possession of the unit after paying a huge sum towards the cost of such unit. In the instant case, the developer failed to handover the possession of the unit even after 57 months, whereas the parties had agreed to a period of 30 months with an additional grace period of 6 months for the purpose of handing over the possession of the unit.

  - Usually, the developers contend that the delay in handing over possession was on account of governmental delays. Relying on the principle that the allottees cannot be asked to wait indefinitely for possession of the unit, the Delhi RERA in **Amit Kumar Vaid vs. Antriksh Developers and Promoters Private Limited; M/s. JBB Infrastructures Private Limited vs. M/s. Parsvnath Developers Private Limited and Anr; and**

    Raghav Mittal vs. Antriksh Developers Private Limited directed the developers to refund the amount with interest from the date of receipt of such amount until the date of full payment made to them.

- **Karnataka RERA**
  - **Monu Gupta vs. B. Rajshekar**

    In the instant case, the allottee alleged that the developer had failed to give possession of the unit and had unilaterally extended the date of possession. In the absence of any specific and concrete denial, Karnataka RERA concluded that as per Section 18 of the Act, the person aggrieved has a right to claim compensation.

  - **Manoj Radhakrishna vs. Avinash Prabhu**

    Karnataka RERA directed the developer to pay interest to the allottee as the developer failed to abide by the terms of the agreement which mandated the developer to complete the project as per the agreed timelines. The allottee had paid all instalments towards the purchase consideration and Karnataka RERA granted relief under Section 18 of the Act.

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- **Thomas K.A. vs. M/s. Antevorta Developers**

  In the instant case, the developer had communicated to the allottee that they would handover the possession by April 2018. However, the agreement for sale executed between the parties provided for the date of possession

  as 26th September 2020. Karnataka RERA held that the agreement executed between the parties is binding and the terms of the same will prevail. The communications made by the developer was with the objective of prior fulfilment of the commitment, but it cannot be held against the developer to mean that he had revised the date of possession to 2018.

- **Capt. Dev Krishnan vs. Townsville Neo Town**

  Karnataka RERA held that in the event of a developer being substituted, the new developer shall also be liable for all the existing obligations of the erstwhile developer. In the instant case, there was a delay on part of the new developer in handing over the possession of the unit. Karnataka RERA granted relief to the allottee and ordered the developer to pay compensation to the allottee.

- **Ravi Kumar vs. R.R. Mahapatra**

  The allottee contended that the developer had lured the allottee into a scheme by way of misrepresentation. Subsequently, the developer refunded the amount paid by the allottee after retaining an amount of INR 50,000 claiming to be administrative charges. Karnataka RERA held that as per Section 18 of the Act, the developer was bound to return the amount in case of loss suffered by the allottee and also awarded interest.

- **Naveen Shetty vs. Provident Housing Limited**

  Karnataka RERA refused to grant interest to an allottee at the rate of 24% p.a. Karnataka RERA observed that the rate of interest is not in accordance with the provisions of the Act and the Rules made thereunder.

  However, Karnataka RERA ordered the developer to refund the amount to the allottee along with interest at the rate provided under the Act.

- **Mamata Kumari Choudhary and Ashok Kumar vs. Ozone Urbana Infra Developers Private Limited**

  Karnataka RERA held that the allottees were entitled to compensation from the date of the deed till the receipt of the occupancy certificate. The developer failed to complete the project on time. The developer introduced a scheme to provide compensation for the delay to the allottees and commenced sale. Karnataka RERA found that the sale deeds executed by the developer violated the provisions of Section 17 and 19 (10) of the Act because the developer had executed the sale deeds without applying for the occupancy certificate. Sale Deed is required to be executed only after obtaining the occupancy certificate.

- **Satyakam Vashistha vs. Mantri Technology Constellations Private Limited**

  Karnataka RERA held that compensation for delayed possession will be paid from the date which is mentioned as the due date in the agreement for sale and not from any other date which the developer claims.

- **Vikas Kumar vs. Omar Sheriff**

  Karnataka RERA observed that since the developer had unilaterally postponed the date of completion of the project, the allottee is entitled to

compensation as per the provisions of the Act.

- **Prashanth vs. Purva Star Properties Limited**

  In this case, the developer had obtained occupancy certificate in 2018. However, the developer executed a sale deed much later in May 2019. As per the provisions of Section 19(10) of the Act, an allottee is required to take possession of the unit within 2 months from the date of the occupancy certificate. However, since the developer failed to execute the sale deed in time, the developer was directed to pay compensation to the allottee.

2.2 Whether the terms of the agreement for sale prevail over the provisions of the Act

Prior to the introduction of the Act, a standard agreement for sale was not mandatory. When the Act came into force, it mandated that the agreement for sale to be executed between the developer and the allottees should be in accordance with the proforma agreement for sale provided under the Rules. This led to the introduction of a new regime where the agreement for sale ensured ample protection to the allottees.

The real estate regulatory authorities across the country have held in multiple cases that the provisions of the Act shall prevail over the agreement for sale. This was more so from the perspective that in some cases, agreements for sale were heavily skewed in favour of the developers. Some of the relevant judgments on this issue are as follows.

➢ **MahaRERA**

- **Sundeep Anand and Ors. vs. Kul Developers Private Limited and Anr.**

  Laying down the controversy at rest, MahaRERA held that the provisions of the Act will prevail over the terms of the agreement for sale. In this case, MahaRERA was to determine whether the allottee would be entitled to get interest as provided under the Act or as per the agreement between the parties. MahaRERA observed that "The Act is a special enactment for protecting the interest of the allottees with a view to complete the project in a specific timeline. There is no phraseology such as 'unless agreed to the contrary under Section 18' which allows the terms of the agreement to prevail over the provisions of the Act." MahaRERA held that interest is to be awarded at the rate as prescribed by the statute for the delayed possession.

➢ **Haryana RERA**

- **Mohini Vij vs. Emaar MGF Land Limited**

  Following suit, Haryana RERA also held that the provisions of the Act will prevail over the agreement for sale. In this case, Haryana RERA observed that the interest payable under the agreement for sale is nominal, unjust and completely one-sided. Accordingly, Haryana RERA directed the developer to pay interest in accordance with the provisions of the Act.

➢ **Karnataka RERA**

- **Vignesh V. Kamath and Anr. vs. Nitesh Estates Limited**

  In this case, Karnataka RERA was faced with a question whether the allottee would be entitled to interest as per the provisions of the Act. The developer contended that there was no agreement between them and the allottee with respect to payment of interest and thus the developer was not liable to pay interest. However, Karnataka RERA did not appreciate this argument and held that Section 18 of the Act makes it mandatory for the developer to return the amount along with interest at the rate prescribed. Accordingly, the developer was directed to pay interest as per the provisions of the Act.

- **Hamza vs. Janaadhar (India) Private Limited**

  In this case, the terms of the agreement for sale stated that if the allottee did not cancel the booking within 7 days of booking the unit, the developer will be entitled to forfeit the booking amount. Karnataka RERA held that this term in the agreement for sale will prevail over the provisions of the Act. In this case, the developer was able to establish that it suffered a loss and was forced to reserve the unit with a hope that the allottee would take progressive steps towards his payment obligation.

- **SVLN Sridhar Rao vs. SJR Prime Corp**

  In this case, Karnataka RERA gave precedence to the settlement agreement over the provisions of the Act. The allottee stated that the project was not registered, however the occupation certificate was obtained. In view of the same, Karnataka RERA issued notice to the developer and thereafter a settlement agreement was executed between the developer and the allottee whereby the developer agreed to refund the amount paid by the allottee. Hence, the project was exempted from registration and the complaint was withdrawn in view of the settlement agreement.

2.3 Agreements executed prior to the Act coming into force

MahaRERA, vide Circular dated 27th June 2017, had, inter alia, specified that in respect of ongoing projects which were required to be registered under the Act, where the agreements were executed prior to 1st May 2017, shall be governed by MOFA.

However, with time, the provisions of this circular were diluted and the agreements which were executed prior to the Act coming into force were also governed by the provisions of the Act.

➢ **MahaRERA**

- **Umesh Vyas vs. Prima Terra Buildtech Private Limited and Anr.**

  The developer had committed to handover the possession of the flat by December 2013. However, the developer failed to do so and accordingly, the allottee filed a complaint before MahaRERA seeking interest for delayed possession. The developer contended that since the agreement for sale had been registered under the provisions of MOFA and hence the complaint is not maintainable. Refuting the contentions of the developer, MahaRERA held that the allottee was entitled to the relief claimed by him.

➢ **Delhi RERA**

- **Kumar Manish vs. Rachna alias Lata Dixit**

  Delhi RERA rejected the complaint wherein a challenge was made with respect to violations of various clauses of the agreement for sale executed between the parties. Delhi RERA held that the project was completed long back and in view of the applicability of the Limitation Act, 1963, the complaint was not maintainable.

➢ **Karnataka RERA**

- **Raghunath MS vs. Esteem Group**

  In this case, the project was completed and conveyed to the association of allottees prior to the commencement of the Act. The allottee had purchased the unit from an erstwhile allottee. The developer contended that since the project was completed before the commencement of the Act and the occupancy certificate was obtained, they cannot be bound by the provisions of the Act. Referring to the Preamble of the Act, Karnataka RERA held that even if the project was completed prior to the commencement of the Act, the developer is bound by the provisions of the Act. Accordingly, Karnataka RERA directed the developer to hand over all documents and execute a registered deed to include civic

amenities in favour of the association of allottees.

2.4 Formation of association of allottees for completion of the project

Sections 7 and 8 of the Act empowers the real estate regulatory authorities to revoke the registration of a project and take such action(s) as it may deem fit for carrying out the remaining development work. Further, under Section 37 of the Act, the authority may, for the purpose of discharging its functions, under the provisions of the Act and the rules made thereunder, issue such directions from time to time to the developers, allottees or real estate agents as the case may be and such directions shall be binding on all concerned. MahaRERA vide its Order dated 28th March 2019 has also issued directions for revocation of registration of the projects and the steps taken thereafter.

Lately, various associations of allottees have taken this route and have prayed before the real estate regulatory authorities to revoke the registration of the project and permit them to complete the construction of the project in case where there has been substantial delay on part of the developer in completing the projects. We have highlighted some of the instances and the stand taken by the real estate regulatory authorities in relation to the same.

- **MahaRERA**
  - **Dattatray Khedekar vs. M/s. ShreePrakash Creative Buildcon J.V.**

    MahaRERA was of the view that it would not be appropriate to create further charge on the project in the nature of allowing refund of money to any allottee from the designated account specially created as a ring fenced account for the purpose of completion of the project. Keeping in line with the directions given vide the aforesaid order, MahaRERA directed the developer to handover the list of allottees in the project to the complainants to enable the allottees to take an informed decision pertaining to the project.

    MahaRERA also gave an option to the developer to seek the approval of the association of allottees for order under Section 7(3) of the Act[1] as per MahaRERA Order no. 7/2019[2] regarding completion of project in an extended specific time period instead of revocation of project.

  - **Anita and Sanjay Kamble vs. Govind Marutirao Kakde**

    Keeping in mind the larger interest of all the allottees of the project, MahaRERA held that awarding interest at the stage of the project where only 60% of the super structure work is completed would mean jeopardising the project completion. Accordingly, MahaRERA directed that in case the developer fails to complete the project by the specified date, the allottee through the association of allottees shall be at liberty to seek remedy under Section 7 of the Act.

  - **Mithanagar Archa CHS Ltd. vs. Dhanshree Developers Private Limited**

    The developer was ordered to wind-up its operations. Accordingly, the allottees sought for revocation of registration of the project so that the society (formed by the allottees) could complete the project by utilizing its own funds. After hearing all the parties, MahaRERA revoked the registration of the project and also directed to freeze the designated account of the project. This was one of the very few instances where MahaRERA had revoked the registration of the project.

2.5 Non-registration of the agreement for sale

Section 13 of the Act inter alia prohibits a developer from accepting an amount exceeding 10% of the total consideration for a unit, plot or building as the case maybe, without executing an agreement for sale and without having the same registered.

This has been one of the most common issues

where the developers failed to execute an agreement for sale inspite of receiving more than 10% of the total consideration. The real estate regulatory authorities often take a stringent view and direct the developers to execute and register an agreement for sale where developers have received more than 10% of the total consideration.

Some of the noteworthy rulings have been captured in the following paragraphs.

- **MahaRERA**
  - **Dinanath Ragunath Chaudhari vs. Linker Shelter Private Limited**

    The developer had terminated the booking on the ground of non-payment from the allottee. Despite the allottee having paid more than 10% of the total consideration, the agreement for sale was not executed. MahaRERA held that the developer had committed a default under Section 13 of the Act and thereby directed the developer to withdraw the letter of termination and register the agreement for sale within a period of 1 month.

- **Karnataka RERA**
  - **Selvaraj vs. Sukesh Jain**

    Karnataka RERA prevented a developer from relying on the clause of the agreement for sale which entitled the developer to forfeit the amount and demand interest at a higher rate than that provided under the Act, as the developer had failed to execute an agreement for sale inspite of receiving more than 10% of the total consideration for the unit.

  - **Sudhir Pillai vs. M/s. Shobha Limited**

    Karnataka RERA held that the developer was required to register the agreement for sale at the developer's own cost and no recovery of registration cost can be made from the allottee since the delay in executing the agreement for sale was on part of the developer. Further, Karnataka RERA recognised the right of the allottee to register the agreement for sale at a later stage.

2.6 Compensation towards mental agony

One of the most common prayers by allottees before the real estate regulatory authorities is seeking compensation for mental agony. But what amounts to mental agony has not been discussed with clarity by the real estate regulatory authorities.

In **Suman Rupanagudi vs. Adarsh Developers** the Karnataka RERA tried to clear this ambiguity by placing reliance on the judgment of the Hon'ble Supreme Court of India in **Ghaziabad Development Authority vs. Union of India**. The Hon'ble Supreme Court, while considering a case of breach of contract under Section 73 of the Indian Contract Act, 1872, held that no damages are payable for mental agony in case of breach of a contract.

In **Lucknow Development Authority vs. M.K. Gupta**, the Hon'ble Supreme Court of India held that the liability for mental agony had been fixed not within the realms of contract but under the principles of administrative law. In view of the same, Karnataka RERA refused to grant relief towards mental agony.

2.7 Amenities

The term "internal development works" has been defined under the Act to mean roads, footpaths, water supply, sewers, drains, parks, tree planning, street lighting, provision for community buildings and for treatment and disposal of sewage and sullage water, solid waste management and disposal, water conservation, energy management, fire protection and fire safety requirements, social infrastructure such as educational health and other public amenities or any other work in a project for its benefit, as per sanctioned plan.

Section 19(2) of the Act provides that the agreement for sale shall, inter alia, specify the particulars of the "internal development works." This goes on a long way in imposing accountability on developers to ensure that the allottees are well informed about the amenities in the project.

Real estate regulatory authorities have been faced with issues pertaining to parking spaces, internal roads, common area facilities, sewage treatment plants to name a few. Some of them are highlighted below.

- **MahaRERA**

  - **Yogesh Dixit vs. Manikcand Vasudha Developers (Sai Eshanya)**

    MahaRERA, while dealing with the issue of car parking, relied on the judgment of the Hon'ble Supreme Court of India in the matter of **Nahalchand Laloochand Private Limited vs. Panchali Co-operative Housing Society Limited**. The Hon'ble Supreme Court held that under MOFA, stilt area cannot be treated as a garage and that parking areas (open to sky or stilted portion) cannot be excluded from common area and facilities under MOFA.

    Accordingly, MahaRERA was of the view that the parking space in open parking area or stilt portion are not saleable along with the unit because they are "common areas".

    MahaRERA further observed that the common areas are to be transferred to the society of the allottees by the developer and therefore the society vis-a-vis its members have the right to use each and every part of the common area including the open or stilted car parking space. The developer has no right to sell the stilt parking space as its control is with the society / association of the allottees.

  - **Anita Jayant Oswal vs. M/s. Mahanagar Realty**

    In this case, the allottees had alleged that the developer did not provide amenities such as lifts and internal roads as per sanctioned plans. MahaRERA concluded that these issues are required to be dealt with by the competent authority which has granted permission for construction in the project including issuing the occupancy certificate.

    MahaRERA directed:

    - ✓ the developer to approach the concerned competent authority for redressal of their grievances.
    - ✓ the competent authority to take appropriate action on representation that may be filed by the allottee.

  - **Harish Rao and Ors. vs. Pentagon Shreemangal Vishram Venture and Ors.**

    Various allottees approached MahaRERA after taking possession, on the ground that the developer did not provide them promised amenities like parking, podium and other amenities as set out in the agreement for sale. In this case, whilst disposing the complaint, MahaRERA directed the developer to verify all the amenities of the project in accordance with the commitments made in the agreement for sale and rectify the defects, if any, within a period of 1 month. Further, the developer was asked to submit a certificate of the architect certifying that amenities have been provided as per the agreement for sale.

  - **Rohit Chawla and Ors. vs. Bombay Dyeing & Mfg. Co. Ltd.**

    In the instant case, the developer had published the project and gave assurances regarding details of the amenities and flats and basis such representations, the allottees booked flats in the project in 2012-2013. The developer further represented to the allottees that it would handover the possession of the flat by 2017. However, the developer failed to handover the possession and also failed to provide amenities as were assured to the allottees. Accordingly, the allottees filed a complaint before MahaRERA claiming that they had suffered a loss on account of incorrect

and false statements made by the developer in relation to the project. Further, the allottees also sought refunds of the amounts paid by them along with interest thereon. MahaRERA held that Section 12 of the Act (which deals with obligations of the developer regarding veracity of the advertisement or prospectus) was not retrospective and was not applicable to the instant case since the allottees had booked flats in the year 2012-2013 and the Act came into force in the year 2017. Further, MahaRERA had rejected the plea of the allottees to withdraw from the project since it would jeopardise the completion of the project. The MahaRERA Appellate Tribunal overruled the order passed by MahaRERA and held that provisions of Section 12 (which deals with obligations of the developer regarding veracity of the advertisement or prospectus) are retroactive in nature and the allottees are entitled to protection for breaches and failure of the developer notwithstanding that the transactions between the developer and the allottees consummated before the Act came into force. Further, MahaRERA Appellate Tribunal also held that the allottees are entitled to withdraw from the project and the developer was under an obligation to refund the amounts paid by the allottees along with interest thereon.

- **Karnataka RERA**

  - **Harish Babu M.L. vs. Antevorta Developers Private Limited**

    In this case, the allottee inter alia alleged that the compound wall and entrance gate for the project were not built. Karnataka RERA held that it was the responsibility of the developer to provide for basic amenities like a compound wall or an entrance gate and directed the developer to build the same.

  - **Vidhyadhar Durgekar and Ors. vs. M/s. Ramky States and Farms Limited**

    In the instant case, the sewage treatment plant was alleged to be inadequate as it emitted foul smell. Additionally, the report of the assistant engineer provided that it was not maintained properly and upon inspection by the Pollution Control Board, it was found that the same was inadequate. In such a scenario, Karnataka RERA directed the developer to:

    - ✓ file an application to seek extension of registration of the project to provide all amenities.
    - ✓ ensure that the sewage treatment plant is repaired under the supervision of the Karnataka State Pollution Control Board.
    - ✓ to adhere to the payment of all outgoings until the developer transfers physical possession of the project as contemplated under the Act.

3. FINANCIAL INSTITUTION

3.1 Balancing the rights of allottees and secured creditors

Section 15 of the Act has been perceived as a hurdle to enforce security interests created over other real estate projects by the developer. Under section 15 of the Act, the developer cannot transfer his majority rights in a real estate project without:

- the prior written consent of at least two thirds of the allottees; and
- the prior approval of the relevant real estate regulatory authority.

Therefore, in respect of the enforcement of security interests in such residential properties, the prior approval requirements under Section 15 of the Act would apply. The prior approval requirement under Section 15 of the Act could therefore be a potential obstacle to any step-in rights of a financial institution

as a secured creditor. In some states such as Maharashtra and Karnataka, the issue has been addressed by clarifying that no prior consent is required if such transfers result from enforcement of any security interest by a financial institution / creditor which pertains to any charge registered with/disclosed to the RERA Authorities set up in those states.[3] However, the status in other states is unclear as the real estate regulatory authorities in other states have not issued similar clarifications.

- **MahaRERA Appellate Tribunal**

  - **Xander Finance Private Limited vs. Trivesh Pooniwala and Ors.**

    The MahaRERA Appellate Tribunal had to resolve the inherent tension between the rights of home allottees who were seeking a refund of payment made for a real estate project, and the rights of a financial institution which held security interest in the property in the form of a mortgage.

    MahaRERA had passed an order to create a charge on the property in favour of the allottees.

    The Appellate Tribunal held that the aforementioned order was not illegal, however in order to strike a balance between competing rights and interests, such charge must remain subject to the rights of the financial institution as a secured creditor under the mortgage. In doing so, the MahaRERA Appellate Tribunal noted that Section 26 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 conferred priority to the debts to be paid to secured creditors such as Xander Finance Private Limited.