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“New” Remedies for ‘Home Buyers’ under RERA and Insolvency Code

Introduction:

The housing and construction sector has a multiplier effect on the entire economy - it is the fourth largest employment generator and is a significant contributor to GDP, with studies showing that construction as a whole, accounts for 11.39 percent of the total economic output. Moreover, every rupee invested in the housing sector results in an addition of Rs. 1.54 to GDP and, if household expenditure is also taken into consideration, the contribution adds up to Rs. 2.84.

With intention to balance the interest of homebuyer and real estate developers. *The Real Estate (Regulation and Development) Act, 2016* ('RERA') was introduced with the following objects:-

1. Regulate and promote the Real Estate Sector
2. Ensure Sale of Real Estate Project in transparent manner
3. Protect the interest of consumers
4. Establish the Appellate Tribunal

The Government brought forward several important reforms, the most significant being the Real Estate (Regulation and Development) Act, 2016 (RERA). This undoubtedly has boosted consumer confidence and paved way for accelerated demand for housing products and facilitate flow of investments into the real estate sector, both from global and Indian investors.

Implementation of RERA has also streamlined norms for transparency , accountability and a compliance mechanism for timely delivery of good quality housing projects.

By analysis of the above object, we can say that RERA was introduced to protect and for the benefit of Home Buyers which directly or indirectly put restrictions on Real Estate developers for the interest of Home Buyers, however the law deals with commercial real estate also.

Though model RERA came in 2016 and subsequently states notified rules adopting the model law. RERA regulates real estate projects both commercial as well as residential. We shall discuss the issues and remedies which are relevant for 'Home buyers' under RERA.

Who is Home Buyer?

RERA doesn't define the home buyer but the same falls under definition of "allottee".

As per Section 2(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquire the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent

As per Section 2(zn) Real Estate Project:- means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, **for the purpose of selling all or some of the said apartments or plots or building, as the case may be,** and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

In the above definition of allottee, there are two type of home buyers or allottees are defined:-

- a. First Buyer who directly buy the plot, apartment or building from Real estate developers/promoter.
- b. Second buyers who subsequently acquire the plot, apartment or building from the first buyers.

In above definition of allottee word "otherwise transferred" is included however the same is not explained in the Act. "Otherwise transferred" should mean similar to sold or a transaction which is in nature of sale. Otherwise transferred would include all the transaction where property is sold, transferred or gifted and would not include mortgages or lease.

Exclusion from the list of allottees:-

- a. Person who take the plot/apartment or building on rent
- b. Person who gets new flat (in replace of existing flat) under conversion of existing building into new apartment, plot or building as the same is not for sale and the such project is excluded from the definition of "Real Estate Project" under RERA.

In general any non-compliance, by promoter, in relation to provision, Rules and Regulation of the Act will be default on account of promoter and 'any aggrieved person' can file the complaint against the RERA Authority.

Some of the defaults and corresponding remedies available under RERA are enlisted as infra:

Section	Defaults	Remedies
11 (5)	Cancellation of allotment- Unilateral and without sufficient cause	Allottee can approach to Authority
12	Loss or damage sustain by any person due to false/incorrect statement/information contain in the notice advertisement or prospectus, or on the basis of any model apartment	Compensation by promoter in the manner as provided under the Act. Refund of entire amount along with interest, if person want to withdraw from proposed project.
14(3)	Structural and other defect in workmanship, quality or provision of service or other obligations as per agreement to sale within a period of 5 years* from the date of possession .	Rectification of such defects without further charges, within 30 days Compensation for non-rectification of default
18(1)	Fails to complete or is unable to give possession of an apartment, plot or building - As per agreement for sale; Or - ; as the case may be , duly completed by the date specified therein	- If allottee wish to withdraw and demand the refund, promoter is liable to refund the entire amount with interest - if allottee does not intend to withdraw than he will get interest for every month of delay till the handing over the possession
18(2)	Loss caused to allottee due to defective title of land on which project is developed or has been developed	Compensation from the promoter and the compensation under this subsection shall not be barred by limitation provided under any law for the time being in force

18 (3)	Fails to discharge any other obligations imposed under this Act, Rules, regulation and terms and conditions of Agreement for Sale	Compensation from promoter
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Note:-

*5 Years will be applicable for individual customers separately and period will be as per individual possession.

Some relevant provisions of Gujarat RERA Rules discussed w.r.t Interest

- For the purpose of interest payable under RERA

Rule 16 (1)	- The rate of interest shall be the contractual rate of interest as may be mutually agreed between the promoter and allottee
Rule 16(2)	- Where no contractual agreement than rate of interest shall be rate which is prevalent as per existing directive of RBI i.e. MCLR- +2%
Rule 16(3)	- Period of interest will be the date of payment received by promoter till the date of full amount paid
Rule 17	- Any money (refund, interest or compensation) become payable by promoter shall be payable within 45 days from the date on which such refund become due

Complaint Procedure with RERA

Under the RERA, there are four level of authority where complaint can be filed

1. Section 31- Filing of Complaint with RERA Authority
2. Section 71- Adjudicating Officer
3. Section 44 - Appeal with Appellate tribunal
4. Section 58- Appeal to High Court

As per Section 31 any **aggrieved person** may file a complaint with the **Authority or the adjudicating officer** as case may be for violation or contravention of the provisions of this Act or the Rules and Regulations made thereunder against **any promoter, allottee or the real estate agent** as the case may be.

Recently, in the case of **Sushil Agrwal V/s Yashdhan Associates¹ (2017)** decided by MAHA RERA it was held that there is **no concept of public interest litigation** under the Act. Similarly, in the matter of **Smt. Mani Malhotra Vs. M/s. AGI Infra (Jalandhar Heights)²** -Punjab RERA rejected on similar grounds. In **Ramprasad P Patel V/s Aditi developer³ (Gujarat)** Complaint was rejected as complainant is not aggrieved person as per Rule 11(1).

Person for this section is person as defined in Section 2(z) and shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

There are two type of method for complaint

- a. Online complaint
- b. Offline complaint

Complaint with RERA Authority

- As per Rule 11 of the 'Gujarat Real Estate Regulatory Authority Rules, 2016' complaint would be file for violation or contravention of the provisions of this Act or the Rules and Regulations made thereunder, save as those provided to be adjudicated by adjudicating officer.
- Complaint would be filed in **Form 'A'** along with **Fees of Rs. 1,000** by way of DD
- Written Complaint will be filed in 3 Sets- Rule 12A(1)
- Complaint shall clearly contain particular of dispute and the relief claimed-Rule 12A(2)
- Complaint shall be accompanied by copies of such documents as are necessary to prove the claim-Rule 12A(2)
- Time limit is not defined

Complaint with adjudicating officer

- As per Rule 12 (1) of the 'Gujarat Real Estate Regulatory Authority Rules, 2016' any aggrieved person may file a complaint with the adjudicating officer for compensation under section 12, 14, 18 and 19.
- Complaint would be filed in Form 'B' along with Fees of Rs. 1,000 by way of DD

Application for settlement of disputes and appeals to Appellate Tribunal

- The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.- Section 44(1)
- Appeal is required to me made within sixty days from the date on which a copy of the direction or order or decision made by Authority or adjudicating authority- Section 44(2)
- Appellate tribunal may entertain the application after sixty days if it is satisfied that there was sufficient cause for not filing.
- Appeal shall be disposed within in a period of sixty days from the date of receipt of appeal-Section 44(5).

Appeal to High Court

- Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court.
- Appeal is required to be filed within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal.
- Appeal will be filed if the order of appellate tribunal is given on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908
- High Court may entertain the application after sixty days if it is satisfied that appellant was prevented by sufficient cause from preferring the appeal
- No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

Insolvency and Bankruptcy Code, 2016 (IBC)

After enactment of RERA, Government thought it fit to bring Insolvency and Bankruptcy Code, 2016 (IBC) to wriggle out NPA's from banking system and rightly so as they had mounted to more than Rs.6,00,000 Crores. This Code has an overriding effect on all the laws and gives a moratorium on any litigations against the company

whether new or pending. This proved to be boon for the financially distressed companies and also for erring/defaulting promoters.

But it had unintended disappointment for real estate companies mainly builders/developers who were not delivering the possession on time and were under huge debt from banks/ financial institutions. IBC provided that the company will be run by insolvency professional who is a qualified professional with direction of Committee of Creditors (COC), which would consist of only financial creditors. It was debated whether the home buyers shall be 'financial creditors' or not?

Matter went before the Hon'ble Apex Court in *Chitra Sharma Vs Union of India (Jaypee Infra case)* wherein by way of an interim order court directed advocate to represent the homebuyers interest in the COC and directed Union of India to present their case. Further, Government proactively constituted Insolvency Law Committee who gave their report on 26.03.2018. Therein, the Committee opined that it is well understood that amounts raised under home buyer contracts is a significant amount, which contributes to the financing of construction of an asset in the future. Hence, they proposed homebuyers to be clarified that the intention was to include in the definition of 'financial creditor'. This recommendation was brought into force immediately via Insolvency Ordinance, 2018 on 06.06.2018. This Ordinance clarified that homebuyers were considered to be financial creditors under IBC and definition of 'financial debt' provided under IBC is sufficient to include the amount raised from homebuyers/allottees for a real estate project under its ambit and hence, homebuyers should be treated as financial creditors under IBC.

This clarification subsequently created confusion for the insolvency which were pending during this period. Though the clarificatory amendment was brought it linked the IBC with RERA, it stated that the financial creditor shall be one who is an allottee under RERA. Now, the question came how will huge number of homebuyers specifically in the case of Jaypee Infra which motivated this amendment will actually be possible as the total homebuyers were around 33,000.

Therefore, after deliberations with various stakeholders, the regulator Insolvency and Bankruptcy Board of India brought in regulations to get the representation of class of financial creditors through authorised person (homebuyers) represented by way of Insolvency Professional as their interest keeper in the COC.

The genuine real estate developers/builders were in soup and they were perplexed as the whole company goes under IBC if even one of the project/unit is not delivered on time. It was argued that the laws like RERA and Consumer Protection Act, 1986 are specific and better laws than IBC. The amendment got challenged by Promoters in Supreme Court by way of Special Leave Petition in the matter of *Pioneer Urban Land and Infra Limited Vs Union of India*⁴ and thereafter series of petitions reached the Apex Court challenging the constitutional validity of the above-mentioned Ordinance. Hon'ble Supreme Court after examining the issue, upheld the constitutional validity of the Ordinance and confirmed the status of the homebuyers as financial creditors under IBC. Therefore, law as it stands today is bountiful for home buyers as they have many laws like RERA, COPA⁵ and IBC for creating multiple redressal and the situation which appeared to be tilted in favour of builders have now been table turned.

Therefore, 2018 Amendment Act read with the ruling of the Hon'ble Supreme Court in the PUL (supra) case provided even a single homebuyer or allottee right to file application under Section 7 of the IBC before National Company Law Tribunal in cases of failure/delay by the builder in handing over the possession of the purchased unit. Therefore, IBC empowers the homebuyer to initiate insolvency in case there is default in the debt.

Thereafter, considering representation of various builder/developer bodies, further amendments on threshold for filing the application by allottees was brought in on 28th December 2019, through The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 and as per the amendment, single buyer/homebuyer is prohibited/ barred to approach NCLT under Section 7 of the IBC as the minimum threshold for filing insolvency by allottees is now 100 or 10% of allottees (whichever is lower). Hence, now homebuyers can approach NCLT with a joint application of at least 10% or 100 of the total homebuyers of a project (whichever is less).

Recently even the basic threshold for insolvency default has been increased from Rs.1 lakh to 1 Crore by the Central Government through MCA notification dated 24th March 2020 by using inherent power under Section 4 of the IBC. Hence, now the IBC remedy is virtually available now for the allottees who have to come together and meet both criteria for number of allottees and quantification.

Logically concluding the remedy may be suggestible as RERA first and then followed by IBC in case the promoters are defaulting thereafter.

1. Maharashtra RERA
2. Punjab RERA
3. Gujarat RERA
4. Writ Petition (Civil) No. 43 of 2019
5. Consumer Protection Act, 2019 (Previously 1986)