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- Rajani Associates on RERA: Balancing the need for developers
- IGBC Gold for Raheja Vistas' Building No. 39 in Mumbai

RERA: Balancing the Need of Developers

AMIT KOLEKAR and KHUSHRAV KUMANA explain the right of a developer to assign his interest in the project.

The Real-Estate (Regulation and Development) Act, 2016 (RERA) was enacted to ensure transparency, create accountability and ensure that genuine homebuyers are not cheated and left in limbo by unscrupulous developers.

Benevolent purpose of RERA account

Prior to the RERA era, there were no stringent checks and balances and, as a result, certain unscrupulous developers would collect monies from homebuyers (sometimes the entire sale consideration) and at their whims and fancies either divert the monies (collected from the homebuyers for the purpose of construction of the building) to another lucrative project, pay off their other debts, or siphon off the monies, thus causing the construction to be stalled for years, resulting in litigation, harassment and suffering to genuine homebuyers.

RERA has introduced a concept of having a separate project account, termed RERA account, to be opened by the developer with a scheduled bank (RERA account) in which 70 per cent of the monies collected by the developer (in relation to each project as registered by the developer with the RERA Authority) has to be compulsorily deposited, to ensure that the monies collected from homebuyers are utilised only for the respective real-estate project.



RERA has introduced a concept of a separate project account, from which, the amount can be withdrawn in proportion to the percentage of the completion of the project.

The monies lying in the RERA account can be withdrawn in proportion to the percentage of the completion of the project. Additionally, a mechanism is provided for withdrawing the monies from the dedicated RERA account. Further, RERA also provides for a mechanism of audit of the accounts of the developer within six months from completion of every financial year to ensure compliance.

Registration compulsions

To maintain a degree of transparency and bring in accountability, every project or phase of a project has to be

compulsorily registered with the Regulatory Authority. A unique registration number is allotted to the developer for every such phase.

Any stakeholder or person may visit the website of the Regulatory Authority for that state and view the information about the project (status, approvals and sanctions, scheme of development, litigation, encumbrances, etc). If the developer fails to register the real-estate project or misrepresents the facts pertaining to the project, the RERA Authority is empowered to impose heavy penalty on the defaulting developer and, in certain cases, even cancel the registration granted

by the Regulatory Authority for that specific real-estate project.

RERA goes a step ahead, thereby making it mandatory for brokers, dealers and agents (who engage in marketing of flats or the project for and on behalf of the developer) to register themselves for even more transparency and accountability. The Regulatory Authority is authorised to penalise the broker or agent for any misleading statements or comments made to a proposed homebuyer, and for such other offences.

Hurdles in assignment of interest of the developer

Section 15 (1) of RERA states, "The promoter shall not transfer or assign his majority rights and liabilities in respect of a real-estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority."

There were various ambiguities as to what would amount to transfer or assignment with respect to the real-estate project, thereby requiring the promoter to procure two-third consent of the allottees as well as the consent of the Regulatory Authority.

As the express provisions of RERA (Section 15) imposing restrictions on assignment and transfer of the developer's rights and liabilities was not clear as to what amounts to transfer or assignment of interest of the developer's rights and liabilities with respect to the real-estate project, a clarification circular has been issued by the Regulatory Authority for the state of Maharashtra.

RERA circular permitting assignment of interest to third parties

Under the aforesaid Circular No.11/2017 dated November 8,

2017, the Regulatory Authority for Maharashtra has *inter-alia* clarified instances that would not amount to transfer and instances that would amount to transfer, as well as the procedure to be followed in case of an event classified as a 'transfer' in the state of Maharashtra.

"RERA is a young and evolving legislation."

Instances when intimation is sufficient, and no express permission is required

MahaRERA has clarified instances where the requirement of procuring approvals of two-third allottees and the Regulatory Authority would not be required as:

- A change in internal shareholding or constituents of the developer that does not affect the obligations and liabilities of the developer with respect to the allottees or homebuyers and the liabilities of the developer.
- Any conversion of the promoter entity from (i) partnership firm to LLP or private limited company, (ii) private limited company or unlisted company to a LLP or otherwise, and (iii) proprietorship change by succession to legal heirs.

Instances when permission is required to be taken

MahaRERA has also clarified that:

- Any merger or amalgamation initiated by the developer voluntarily after the cut-off date of April 30, 2017 shall be treated as a transfer and the promoter or developer shall be required to follow the procedure of procuring the approval of the allottees and

the Regulatory Authority.

However, if the amalgamation or merger or demerger of the company is not regarded as transfer under Section 47 of the Income Tax Act, 1961 or where 75 per cent of the shareholders remain same in the resultant company, such amalgamation or merger or demerger shall not fall within the restriction stipulated under RERA and in such a case, the promoter or developer shall not be required to follow the procedure of procuring the approval of the allottees and the Regulatory Authority.

- Where transfer is initiated by third parties (such as financial institutions, creditors, banks, etc), by operation of law or by way of enforcing the security or mortgage, the promoter and/or financial institutions or creditors (which are disclosed by the promoter to the Regulatory Authority on its website) are not required to seek consent as stipulated in RERA. However, the promoter is required to inform the Regulatory Authority in writing within seven days of being aware of the impending or potential transfer arising out of enforcement of security or mortgage and intimate the same to all the allottees in that real-estate project. Further, RERA casts responsibility of intimation on financial institution or bank, ie, within a period of seven days from the actual transfer being effected by such financial institution or bank, the institution or bank has to intimate the Regulatory Authority in writing and intimate all the allottees or purchasers in that real-estate project. Thereafter, the financial institution, bank or creditor shall be treated as the new promoter of the real-estate project and shall be required to upload the

change and details on the website of the Regulatory Authority and take all the responsibilities and obligations of the promoter.

In conclusion

RERA is a young and evolving legislation, which aims to bring uniformity in the law applicable to construction and sale of apartments and units, and to bring transparency, accountability and safeguard the rights of genuine homebuyers who spend a significant amount of their life savings on buying their dream home. The provisions under RERA for compulsory registration of projects and real-estate agents;

designated separate bank accounts for maintaining 70 per cent of the monies collected from homebuyers; and restrictions on the right of the developer to assign and transfer his rights, obligations and liabilities under the real-estate project to third parties, are some of the key changes introduced by the new legislation for the real-estate sector, as there was a need for an organised structure for the real-estate sector pan-India.

However, to balance the need of the developers and enable them to conduct their business, and enable lenders, financial institutions and banks to continue to lend monies to the real-estate sector, certain

clarifications regarding the interpretation and application of RERA were required. MahaRERA has clarified the interpretation of transfer and assignment of interest of the developer in the real-estate project.



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