

**TYPICAL ISSUES IN PURCHASE OF UNDER-  
CONSTRUCTION PROPERTY WITH REFERENCE TO  
PROTECTION AVAILABLE TO BUYERS UNDER RERA,  
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**ABSTRACT**

*Transfer of under-construction property is one of the most complicated topics in real estate as it depends on multiple factors like approvals, funding for construction, construction status, home loan of seller, builder, landowner share, etc. To protect and safeguard the rights and interests of the home buyers and to ensure that they are not exploited by the developers/builders, the government enacted Real Estate (Regulation and Development) Act, 2016. This paper will cover the typical issues in purchase of under-construction property by buyers and the relevant provisions in Real Estate (Regulation and Development) Act, 2016 that provide protection to the buyers in the event of the same.*

**Keywords:** *Real Estate, Under-construction property, Purchase of property, Protection to buyers, RERA, Property law*

## **INTRODUCTION**

Home-owners face a lot of troubles, especially when it comes to dealings with respect to under-construction property. To address the problems faced by buyers and to regulate the ginormous and unregulated real estate sector, the Real Estate (Regulation and Development) Act, 2016 [RERA] was enacted in India which enabled the establishment of Real Estate Authority [Authority] in each state to further establish regulations and rules along with putting out circulars and orders to govern, regulate and develop the real estate sector in the states. For example, the State of Maharashtra, in pursuance of the central act (RERA), brought into force the subordinate legislations: MahaRERA General Regulations, 2017, various rules<sup>i</sup> and also published various general resolutions, circulars (available on the MahaRERA website)<sup>ii</sup>. Frequently asked questions were also put up on the MahaRERA website for easy access and understanding.

RERA has introduced various protections for homebuyers taking into account the various issues encountered by them. The issues encountered during purchase of under-construction property are discussed below.

## **SALE OF UNDER CONSTRUCTION PROPERTY**

Under section 54 of Transfer of Property Act, 1882, sale of transfer refers to the ownership in exchange for a price paid or promised or part-paid and part-promised. Basically, in a sale there exists an absolute transfer of all rights in the property sold. Sale and Purchase of real estate stems from here.

Purchase of a property that has already been constructed and has obtained CC or OC is fairly simple but when it comes to purchase of under-construction property, there are ways that a situation of can get complex, for example when the OC or CC has been granted but the project has not been registered or when there is delay in construction or when there is misappropriation of the money collected from the buyers.

There are 2 ways to buy under construction property. They are: (1) Direct Transfer (involves 2 parties: seller and buyer only) and (2) Resale Transfer (involves three parties: buyer, seller and developer).

## **RESALE TRANSFER: TRI-PARTY TRANSFER DEED**

Conventionally, tri-party transfer deed is utilised for the transfer of an under-construction property. In this scenario, the deed is signed by the seller and the buyer while the builder acts as the confirming party. It is the most beneficial but least preferred option for a buyer. There are three sides to this agreement and each side deals with certain issues while selling or buying the property.

For the first part, the issues that can be faced and that need to be considered by the buyer while buying the property are:

### 1) Assignment Deed/Transfer Deed

The agreement entered into by the builder, seller and buyer should be carefully read by the buyer for the simple reason that till the time the builder executes the sale deed in the favour of the buyer, the builder still has stake in the property. There are certain points that need to be addressed by buyer and seller both alike before signing the transfer/assignment deed:

#### (i) The break-up of the sale price<sup>iii</sup>

In resale under construction property, the sale consideration is normally divided in 2 parts. Normally the seller charges premium on his/her purchase price and at the same time a certain amount is still due from the seller to the builder. This breakup depends on the agreement between the buyer and the seller. The deed should clearly mention the amount paid, amount due and the break-up of the sale price.

#### (ii) Transfer Fees<sup>iv</sup>

It is payable to the builder for the transfer of property before registration. The amount of the same and who will be paying the fees should be discussed with the seller before the agreement is signed. The cost/price advantage to the buyer will be wiped out if the same is not discussed before signing the agreement.

### 2) TDS u/s 194/A of the Income Tax Act, 1961

Tax Deducted at Source is applicable to the total consideration even if the same has been divided between the buyer and the seller for resale of under construction property.

### 3) Home Loan of the Seller and Buyer

In case, the seller and the buyer both have taken out home loans for the property, both the parties should have the terms of their loans set out in the assignment deed. In most cases, an assignee may want to take over and close the loan that the seller is paying but usually, banks are not comfortable with this arrangement.<sup>v</sup> The buyer, buyer's home loan provider, seller and seller's home loan provider should be in agreement with respect to how the loans are going to be dealt with before signing the assignment deed.

### 4) Due Diligence

A clear line of ownership of property title should be established in any sort of property transfer including under construction sale. Other than that factors like difference between pre-launch rate and current rate should be noted, the builder's credibility when it comes to completing projects on time, the seller's history, the reason behind him selling flat, other prices available for the same flat, the buyer's ability to actually pay for the flat, any pending litigation or dispute, etc. Every party to the assignment deed should do their due diligence so as to gain full advantage of the deal being made.

It is beneficial to buy resale under construction property via tri party agreement as the buyer receives the property at lower rate than buying it from the builder himself and stands to gain a profit from the property's appreciation later (if he has bought it by his own money in most cases).

On the other hand, there are disadvantages too like the project may get delayed<sup>vi</sup>, there may be hidden costs or unapproved plans or non-obtained permissions that can halt the construction entirely.

## **DIRECT TRANSFER: BI-PARTY TRANSFER DEED**

Recently, a new form of ownership transfer, bi-party transfer of under-construction properties is gaining popularity in Delhi, Maharashtra, Uttar Pradesh, and Haryana.<sup>vii</sup>

The process is as follows:

- (i) Seller finds another buyer for the property that is in his name and that he bought from the developer/builder.
- (ii) The Seller approaches the builder stating he wants to transfer the under-construction property to another buyer.
- (iii) The Builder issues a Non-Objection Certificate (NOC) that states that he does not have an objection to the transfer of the under-construction property to the new buyer.
- (iv) Based on the builder's NOC, seller and buyer execute a sale agreement or transfer deed.
- (v) Seller submits this sale agreement with the builder.
- (vi) Based on the sale agreement, the builder transfers allotment in the name of a new buyer in his records.

There are various problems in an agreement like this and hence the buyer should be extremely aware while signing such a bi-party agreement. Following points should be noted:

### 1) Title of Property

Until a conveyance deed has been executed in the favour of the seller or the new buyer, the property belongs to the builder. In such a case, executing an agreement regarding the property without including the builder, who is the legal title holder of the property puts the buyer in a position of risk as the entire transaction just depends on the NOC of the builder.

### 2) Builder's non reliability

If X and Y as seller and buyer enter into an agreement that is mutually agreeable to them and aligns with their interests and the builder reads the agreement and signs the NOC, the parties to the agreement would be led to believe that the builder accepts the terms. But if later he refuses to accept it, he cannot be held liable as he is not a party to the agreement. In case of landowner's share dispute, it can land the buyer into big trouble because as much as 5-6 parties can be involved on a case to case basis.<sup>viii</sup>

It is a disadvantageous proposition because if the developer fails to deliver as per the terms of the agreement between the seller and the buyer then the buyer will not be able to hold the developer liable for a breach as he was not contractually obligated like the buyer and seller were to follow through with the exact terms of the agreement.

## **RELEVANT PROVISIONS UNDER RERA THAT OFFER PROTECTION TO THE BUYER OF UNDER CONSTRUCTION PROPERTY**

The Purchaser/Buyer is always at the position of maximum risk. Under Real Estate (Regulation and Development) Act, 2016, [RERA] certain provisions have been enacted for buying under construction property.

- **Section 12** states the obligations of the promoter regarding the veracity of the advertisement or prospectus. It reads as follows:

*“Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:*

*Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.”*

- It allows the purchaser to claim compensation in situations where any person sustains any loss or damage by reason of any incorrect, false statement included in the advertisement or prospectus on the basis of which an advance or deposit was made by such person. If the person affected by such incorrect advertisement or prospectus wishes to withdraw from the

project, he shall be returned his entire investment along with interest at such rate as may be prescribe and the compensation as per the Act.

- It should also be noted that according to FAQ No. 43 on the MahaRERA website, where an agreement has been executed before the project is registered, then the consent of all pre-registration allottees shall be required as well.
- This helps protect the buyers from being exploited and allows them the option of withdrawal if they wish to do so.
- **Section 13** also states that no deposit or advance can be taken from the buyer without entering into an agreement for sale and registering it. This protects the buyer by giving him the power to protect himself by having a contract with the developer in a situation where things go south.
- **Section 14** talks about Adherence to sanctioned plans and project specifications by the promoter. It reads as follows:

*“(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.*

*(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make-*

*(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:*

*Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an*

*authorised Architect or Engineer after proper declaration and intimation to the allottee.*

*(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act."*

- The promoter/ developer is not allowed to digress from the sanctioned plan or the layout plan. He is not allowed to make sudden changes or alteration which aren't incorporated in the plan or which has not been communicated to the Allottee during the time of purchase without the previous consent of the person. Any alterations other than minor can only be one with the written consent of 2/3<sup>rd</sup>s of the allottees, other than the promoter who have agreed to take apartments in such buildings. This helps ensure that the buyers of under construction property are not left eventually with or without any fixtures, fittings, amenities and common areas in the project they put their hard-earned money in hoping for what getting what the sanctioned plans and layouts showed.
- Sub-clause (3) also ensures that in case any structural defect or any other defect in the workmanship, quality or provision of services any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days. If he fails to do so, the allottees are entitled to receive compensation as provided under the Act. This an important provision as it holds the builder/promoter liable even after the project is complete. Therefore, if the promoter used inferior quality of goods and workmanship to get things done or left out things to be done, he could be held accountable for the same.



- **Section 15** provides for the promoter to get the written consent of 2/3<sup>rd</sup> of the allottees before transferring assigning his majority rights and liabilities in respect of a real estate project to a third party so long as it does not affect the previous allotments. It further provides that when the assignment is permitted by the allottees and the RERA authority, the intending promoter is required to comply with all pending obligations as per the Act and the agreements entered into by the previous promoter. This protects the buyer in case of transfer of obligations of the promoter as it ensures that the project goes on as the buyer intended it would when he bought it.
- **Section 18** provides for what should be done when there is a delay in giving the possession. It reads as follows:
  - (1) *If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -*
    - (a) *in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
    - (b) *due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*  
  
*he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*  
  
*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.*
  - (2) *The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.*

*(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.*

- Allottee can ask for refund of the amount paid for the purchase of the flat if the Promoter does not abide by the deadline of giving the possession of the flat as mentioned in the agreement of sale or the allotment letter. The purchaser has two recourses in such situations. It protects the buyer in both situations of wanting to withdraw and not wanting to withdraw. The Purchaser who wishes to withdraw from the project is entitled to compensation and return of the amount deposited during the time of purchase along with the interest thereon. The Purchaser who does not wish to withdraw from the Project is entitled to interest every month from the delay till the day of handing over the possession.
- In Maharashtra, according to FAQ No. 20 of MahaRERA, when there is delay in getting possession from the promoter, the buyer is entitled to get interest on the amount paid by him, for such delayed period in accordance with the model form of agreement, the Promoter agrees to pay to the Allottee, who does not intend to withdraw from the project, interest as specified in the Rule, on all the amounts paid by the Allottee, for every month of delay, till the handing over of the possession.
- Also, according to FAQ No. 21 of RERA, the interest payment is according to the model form of the agreement and hence should be automatically paid. The buyer can file a complaint to MahaRERA if there is a grievance (as per section 31<sup>ix</sup> of the RERA to the Authority or the adjudicating authority as the case maybe for the contravention of the Act or Rules)
- **Section 19** provides the following rights of the allottees. The following would be the rights that a purchaser of under-construction property would have:

*(1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made there under or the agreement for sale signed with the promoter.*

(2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of subsection (2) of section 4.

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made there under.

(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

(8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

(9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.

- The authority under **Sec.35** of RERA can take notice of the act which is in contravention to the Act or regulations therein by itself (suo motu). The Authorised Officer can call for investigation in such cases. This ensures the promoters are kept in check as action against their wrongful acts can also be taken without the buyers approaching the Authority. Section 35 reads as follows:

(1) Where the Authority considers it expedient to do so, on a complaint or suo motu, relating to this Act or the rules of regulations made there under, it may, by order in writing and recording reasons therefore call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.

(2) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under sub-section (1), the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:—

- (i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;
- (ii) summoning and enforcing the attendance of persons and examining them on oath;

*(iii)issuing commissions for the examination of witnesses or documents;*

*(iv)any other matter which may be perscribed.*

- The Authority under Sec 38 has the power to issue penalty to the defaulter or the person whose acts are in contravention to the provisions of RERA. Section 38 reads as follows:  
*(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.*
- In furtherance to the same, Section 40 enables the Recovery of interest, penalty, compensation and enforcement of the order etc. It reads as follows:  
*(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue*
- If a buyer wants to file a complaint in Consumer Court, he can do so as according to FAQ No. 31 of RERA, only civil courts are barred from entertaining disputes in respect of matters which Real Estate Regulatory Authority or the adjudicating officer or the Appellate Tribunal is empowered under the Act to determine (section 79). The consumer forums (National, State or District) have not been barred from the ambit of the Act. Section 71 proviso permits the complainant to withdraw his complaint as regards matters under section 12, 14, 18 and section 19, from the consumer forum and file it with the adjudicating officer appointed under the Act.

## CONCLUSION

Earlier, there was not enough protection for buyers of under-construction property. In light of the issues mentioned above that complicate the purchase of an under-construction property like different types of transfers, tax compliance, approvals received by the developer, loans received by developer, home loans undertaken by either of the parties, break-up of sale price, etc., the enactment of the Real Estate (Regulation and Development) Act, 2016 is a very big step. The Act, by itself, is important as it brings under regulation the previously unregulated sector. The provisions of the Act are consumer-oriented as can be seen from the protections offered to the buyer mentioned above. It goes a step further to specifically protect the buyers of under-construction property by allowing the buyer to seek redressal by way of compensation, withdrawal from project or approaching the RERA authority and consumer courts in cases when the promoter digresses from the information mentioned in the advertisement or from the sanctioned plans or when there is structural defect in the project post completion or in cases where possession has been delayed. It also ensures that the permission of the buyer is taken before major changes in the project and before the developer assigns his major rights and obligations to another promoter. Provisions are also put to ensure that the transfer of project from one promoter to another does not absolve the new promoter from the obligations that the previous promoter had. Various state regulations, rules, circulars and orders (e.g., MahaRERA as mentioned above) help fill up the blanks in the central Act and makes RERA an Act which effectively protects the buyers of under-construction property. Additionally, provisions are also made for when buyers default on payments or try to defraud the promoters. This helps in protecting the interests of the promoters and not just the buyers which makes RERA a comprehensive and fair Act which can efficiently regulate the real estate sector, including the transfer of properties that are under construction.

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- <sup>ix</sup> 31(1) *Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made there under against any promoter allottee or real estate agent, as the case may be.*  
*Explanation. – For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.*  
(2) *The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified by regulations.*