

TO RIGHT A WRONG JUDICIAL RECOURSE FOR HOME BUYERS

Recent judgements and actions against defaulting builders by the judiciary and the apex court have encouraged buyers to approach courts in case of grievances and developers to be more compliant. Sapna Srivastava takes stock of the changing scenario.



Till very recently, the scales between builders and homebuyers were tipped in favour of the former. The series of legal judgements passed, however, seem to be changing this for good. I would call it 'Righting the Wrong'.

For long, the buyers played the second fiddle in the whole ball game of buying a house, having to follow

the diktat of the builder. The reason was they had no quick and efficient recourse. With the implementation of RERA and the judiciary across states becoming more proactive in providing fast and competent actions against errant builders, the current scenario is changing for the better of the entire real estate sector.

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The professional and well organized developers feel that now it is a level playing field for all, as compliant developers will not be at a disadvantage. This has also enhanced the



confidence among reluctant buyers to make purchases that will help boost sales for the sector. More importantly, the strict actions against deviant organizations will help clean up the industry, leaving only the qualified companies to operate in a process driven environment.

While, the courts have finally realized the necessity of a balanced playing field between developers and homebuyers, there still remain several lacunae in the laws. Also many from the industry point out, that the utmost interest of a buyer in approaching the court is to get the home promised. Hence, the courts, consumer tribunals and RERA bodies would need to adopt a conciliatory approach to deal with the issues between the builders and the buyers.



KK RAMANI

KK Ramani a veteran advocate, who has handled some very high profile real estate litigations, raised some very pertinent points. "Real estate sector had come to a situation where there was a need for a drastic

surgery. An effective deterrence to serve as example of possible consequences was a must to send a proper message within the sector, for restoring the confidence of hapless consumers. It goes without saying that harsh punitive action should precede a thorough investigation and fair appraisal of facts to ensure that only the defaulters are punished, and the punishment is commensurate with the effects of default," he said.



ARADHANA BHANSALI

Aradhana Bhansali, Partner, Rajani Associates has 15 years of experience in real estate matters. She expressed her opinion on the tough stand, being taken by the judiciary and quasi-judicial authorities against defaulting developers. "Homebuyers cannot be just thrown into a frying pan. The flat buyers should get their dues. We would like to know the profile of the individuals associated with the company, which is willing to take over the projects". This is what the Supreme Court remarked when another builder was ready to take up the project left incompleting by Amrapali builder.

In the recent past, the judiciary including the regulatory authority under the Real Estate Act, 2016 (RERA) have taken proactive steps to protect and provide relief to homebuyers. Even the person who is stepping in the shoes of an erring

developer is asked to show/ prove its bonafides so that the home buyer's rights are protected and diluted in any manner.

The classic case of Jaypee Developers, Unitech, Omkar Developers to name a few, are examples of courts coming to the aid of home buyers and have even directed insolvency proceedings to take into consideration the rights of the homebuyers. The days of errant developers cheating, delaying possession and arm twisting the home buyers have long passed. Now, more than ever, home buyers have a right to timely possession, delivery of their dream homes, together with the amenities and facilities, to enjoy their investment without being harassed and fooled by errant developers."



DIVYA MALCOLM

Expressing her views, **Divya Malcolm, Principal Associate, Kochhar & Co** said, "The judiciary is not on a witch-hunt for builders. Errant and delinquent developers have been brought to book. The responsible developers are, in fact, reaping rich dividends. For them, the marketplace is becoming a level playing field. Cheating and fraudulent practices cannot be compared to the hardships wrought by business cycles. News of developers forging ownership documents or encroaching upon

adjoining lands is surfacing. In some instances, the developers had overstretched their position. These are the types that have to be weeded out of the system - and the judiciary is doing a commendable job.”



VIVEK DASWANAY

Vivek Daswaney, Partner – IndusLaw, a multispecialty law firm brings up a major point of contention - that is the “Insolvency and Bankruptcy Code, 2016” (IBC). The IBC allows the creditors of the real estate developer, to make an insolvency application before the National Company Law Tribunal (“NCLT”) and initiate insolvency resolution proceedings against the company. During these resolution proceedings, the promoters lose control over their Company and an insolvency resolution professional (IRP) is appointed to take over the reins of the Company. If this resolution plan fails, liquidation proceedings are initiated which are intended to essentially wind up the Company. A question arises as to what happens to the rights of the home buyer in such a scenario.

“The IBC contemplates two kinds of creditors - financial and operational. Financial creditors are those who have given debts to the Company in the nature of loans, debentures, etc. Whereas operational creditors are those to whom money is to be paid for the goods or services provided by such persons.

One of the biggest questions arising, is whether or not a home buyer will be considered to be an operational creditor under the IBC. The NCLT has held in multiple cases that home buyers are mere allottees of flats and not operational creditors of the Company.

However, the courts have also held that, if the Company agrees to give a periodic assured return to the home buyer, the home buyer will then be considered to be a financial creditor. In the Jaypee case, the apex court took note of this anomaly and sought clarification from the Central Government. In the backdrop of this chaos, the Ministry of Housing and Urban Affairs issued a circular, introducing a new category of creditors and several experts, who are of the view that home buyers would fall under the head of this new category of “other creditors”.

The IBC provides that an insolvency application can be made by a financial creditor, an operational creditor or the Company itself. Therefore, if the home buyer is designated as an “other creditor”, it would mean that while the home buyer cannot initiate insolvency proceedings, they can get a piece of the pie, if the Company is liquidated. Even then, the home buyer is entitled to a piece of the pie only after financial creditors, workmen, employees, operational creditors and the government have received their dues. This begs the question-whether or not the home buyer will get anything at all?

Assuming the home buyer does get recognised as a financial creditor by fiction of law, the question then arises - what would be their rights and obligations vis-à-vis the other lenders and creditors, who will then have a justifiable argument of taking a much higher risk compared to the home buyer and should therefore have priority,” stated **Daswaney**.

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The latest report of the Insolvency Law Committee has recommended home buyers to be treated as financial creditors under the IBC, since in essence; the amounts paid by the home buyers are a means of raising finance.
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RERA IMPLEMENTATION

The Real Estate Act, 2016 (RERA), is a fairly new legislation which is a central enactment to build transparency, accountability and also safeguard the interest of genuine homebuyers. RERA is a bold legislation with a lot of emphasis on procedure, dissemination of information and building accountability for development of various projects. Although some states are more proactive than others, overall there is a sentiment of confidence, that this will boost the industry, create stability, promote healthy competition and ensure projects are completed as advertised. So that there are fewer delays and a planned and balanced growth of real estate across the country can be achieved. Eventually, this can be achieved with planned and balanced growth of real estate across the country.

By and large RERA has been instrumental in introducing fairness, transparency and professionalism in the hitherto chaotic sector. Putting relevant information in public domain and the institution of the Authority for speedy redressal of grievances has gone a long way in assuring the customers a fair deal consistent with their agreements, with the promoters.

There are nine states that have not yet set up RERA authorities and devised the website, which means RERA is a total non-starter in those states. This is highly discriminatory against the home buyers in those states, who are deprived of the protection granted by the Act.

“Uniformity in rules is desirable, but on account of different municipal laws, prevailing state laws and trade practice in different states it may not be possible to have absolute uniformity in rules. It is necessary to at least ensure, that the Rules and Regulations framed under the Act remain within the letters and spirit of the law,” commented

Advocate Ramani.

RERA being a central enactment, all states were expected to have proper and complete machinery for implementation of the desired object in terms of RERA. However, each state having its own difficulty in setting up the entire office in terms of RERA, even after a year since RERA has been in full effect.

Bhansali contends that, while this may affect the rights of the home buyers in those states, overall, RERA has been effective in driving a positive change in the real estate sector, by bringing more accountability, transparency and also ensuring that the deadlines for completing are met, except in cases of genuine delays and problems. “One would expect that the other states will follow suit, so that the desired results are seen pan India. However as the implementation has been given to each state, there will be some differences and delays and often times non uniformity, as each state will give it its own flavour and create a system of governance within its existing structure. This does not mean that the legislation

has been weakened by such delays, but it provides for different flavours of the enactment, best suited for the requirements of the states,” she said.

On a positive note **Malcolm** stated, “Under our Constitution land is a state subject. There are bound to be local nuances which cannot be flattened overnight. In the context of RERA, different state rules cannot sabotage the main statute. If, by way of delegated legislation, the act is sought to be compromised, the constitutional validity of such legislation can be easily challenged. Flexibility adds to the strength of the machinery, it does not diminish it.

DILUTION OF RERA

There are instances of dilution of RERA provisions by States which go against the spirit of the Act, particularly in areas of on-going projects and withdrawal from specified bank accounts. Being a Central Act, a mechanism needs to be devised by the Central Government, to conduct a review of the Rules framed by the State and intervene where rules are contrary to, or not consistent with the provisions of RERA.

Bhansali elaborates. “As per RERA, an on-going project is basically a project for which the completion certificate has not been issued” on the date of commencement of the Act. However, most of the states diluted this definition by stating that any project completed by 60%-70% in all respect would not come within the purview of RERA, so that most of the on- going projects were ousted from the jurisdiction of RERA.

Similarly, the provisions of imprisonment under RERA for not following the orders of the competent authority under RERA have been diluted in most states, by providing for compounding of offences and heavy penalties on the defaulting party. While some may say that this dilution has affected

the efficiency of RERA, in most cases, there has in fact been no such effect, as the competent authority under RERA is proactive and provides relief to homebuyers or the developer as the case maybe. Maha RERA (Maharashtra) is quite active and comes down heavily to those stakeholders who are diluting the core objective of the statute.”

According to **Malcolm**, diluting RERA will drive away the best of what realty has to offer. “SEBI has advanced our securities’ market and not retarded it. Similarly, RERA is merely clearing the decks for a streamlined market dominated by responsible players. One aspect that has not received enough attention is that of the developers going to RERA for violation of the Flat Purchase Agreements by the buyers. In correct perspective, RERA is a win-win situation. States that choose to get around it, will suffer.”

RERA EFFECTIVENESS

RERA being a new legislation is evolving. RERA prescribes strict penalties for the developer, who fails to complete the project on time as also for agents who advertise and sell inventory without a proper registration.

Advocate Ramani mentioned, “So far RERA has been mainly concentrating on redressing the customers grievances of the allottees and ensuring due compliance by the promoters. In doing so, the approach of MahaRERA has been to settle grievances amicably within the framework of the Act. The thrust has been to bring promoters and allottees on a common platform. It is however observed that, in some cases when the delay in completion is caused by Airport Authority, Environment Clearance Authority

and Municipal Corporation, the promoters are subjected to harsh levy for the mistakes or negligence of these authorities. In such cases the Regulatory Authority ought to adopt lenient attitude towards promoters. Formation of Conciliation and Dispute Resolution Forum to facilitate resolution of disputes amicably, is an important step which will save the cost and time of all parties involved in litigation.”

Bhansali adds, “Also, as per RERA, a model format for agreements is prescribed, to balance the relationship between homebuyers and developers. If the norms under the agreement are diluted in any manner whatsoever, the regulator has come down heavily on the developer by directing the developer to be in consonance of the regime. All this ensures that developers do not exploit the homebuyers and insert clauses which are totally one sided. The homebuyer has the relief of raising his concerns before the authority and most times, an amicable settlement is arrived at to ensure that the project is on track and completed and the homebuyers are given the apartment as per what was promised to them.”

Malcolm, appreciating the effectiveness of Maha RERA said, “When RERA was set-up in Maharashtra, last year, we all summed it up as Realty has got its SEBI. Hopefully, dealing in real estate will soon be as simple as transacting in shares. Indeed, MahaRERA is doing an excellent job at being realty’s SEBI. Most importantly, only if a data bank capturing the actual value of real estate is created, can we go to the next level of REITs. Laxity in the implementation of RERA, is a self-defeating proposition. Foreign players or domestic funds would not invest in markets which are all smoke and mirrors.

Maha RERA’s efforts have been exemplary in this sphere. Most of its orders have been balanced and even-handed. Many cases have been settled out-of-court.

MahaRERA has recently set up a conciliation forum, so that the flat purchasers and builders can talk things through. Today, it’s talking about mapping the registered projects by using GIS technology. A proactive forum for healthy dialogue has been created.

Both the developers as well as the flat purchasers are going through a rough time. For instance, many flat purchasers at the time of booking had not factored in the rise in indirect tax from 1% to 12%. Middle classes are unable to absorb such a hike. If all the flat purchasers exercise their option to withdraw from a project, no building will ever get completed. Therefore, now is the time for greater dialogue than ever before.”

ANOMALIES IN RERA

Recently, the Bombay High Court while hearing a batch of petitions, challenging the constitutional validity of various provisions of RERA, questioned the inapplicability of RERA on individuals who form a society and purchase a plot, to construct flats and apartments for their very own members. Such societies need not register themselves under RERA.

Currently, RERA applies only on promoters who advertise their real estate projects for the purpose of selling it to consumers. The authorities cannot take any action against the projects which are not registered with RERA.

The court sought clarification from the government that, if societies are constructing apartments and selling them to their very own members, then they would become the

promoters. So, RERA should apply on them too. “What if in the garb of forming a society, a promoter sells off the flats and earns profits? Given the RERA provision that the society need not register, then does the authority have the powers to take any cognizance post this mischief? Since the RERA comes in effect only after registration of a project, then what if such societies are not registered under the Act.”

Another question arising, is that of control in case of insolvency proceedings. The Insolvency and Bankruptcy Code (IBC) provides that, when an insolvency application has been admitted against a Company, the control over the Company has been taken over by the insolvency resolution professional (IRP).

Even though RERA does not provide that the Authority can take over control of the project and complete it when the Company is insolvent, it is safe to assume that insolvency of the Company will lead to him breaching his obligations under RERA.

Daswaney explains, “Several experts have pointed out the conflict between the IRP and the Authority. Some however feel otherwise, as RERA does not allow the Authority to take over control of the Company, but only of the projects registered under RERA. The IRP on the other hand will take over control of the entire Company. How the IRP and the Authority will work together, is yet to be seen. But one can fairly imagine that it will not be smooth sailing, especially for the home buyers who may be a disjointed community in the whole proceedings.”

While RERA is indeed a game changer, there are some areas of concerns that developers list. For instance, there is no provision for single-window clearance of approvals, which is the single-most

important requirement to cut delays. There is no clarity on the distinction between Occupancy Certificates and Completion Certificate. Also, unless land rates are based on books of accounts, all costs incurred prior to starting of projects would not be added and Joint venture agreements would be adversely impacted. Also, the stipulation that sanctioned plans must be posted on websites would raise issues of Intellectual Property Rights.”

Milind Deora, former Member of Parliament also in his column in a publication had mentioned certain ambiguities, requiring appropriate amendments and corrections. He had stated, “RERA puts the onus on developers to complete projects in a timely and efficient manner, granting consumers the right to hold developers accountable. However,

in order for them to honour their end of the deal, they necessarily require a way to hold bureaucrats and politicians accountable, who can often hold up their projects due to political reasons, bureaucratic red-tapism, and bribe-seeking.

To hold bureaucrats accountable, states must have clear, concise and unambiguous guidelines for real estate development and punitive measures for any officials who delay developments for illegitimate reasons. The real estate business is a massive employer in India, and when it does well, not only does construction boom, but also do cement, steel, furniture, and other allied industries. RERA is, after all, a Central law, and the government at the Centre must intervene and put pressure on states to ensure that its provisions are adequately implemented.”

In spite of all the deficiencies and limitations of RERA, it is heartening to see that the courts and National Consumer Disputes Redressal Commission as well as State’s respective RERA bodies are taking tough stand and setting precedent in terms of getting quick relief to the aggrieved party.

In short the buyers can no longer be taken for a ride by the builder. For developers, it means an opportunity to put their house in order. One can already see a lot of consolidation and joint ventures happening in the sector and that bodes well for the Indian real estate in the long term.

SOME RECENT JUDGEMENTS

Company	Projects	Complaints	Judgement/Orders
Parsvnath Developers	Parsvnath Privilege, Greater Noida	Flat booked by buyers in 2007, possession delayed	To repay Rs 47.5 lakhs, along with interest of 18% per annum.
	Parsvnath Exotica, Ghaziabad	Delay in completion of project	Refund of entire amount paid by buyer, with interest of 12% per annum.
Jaypee Group	Kalypso Court project, Noida Expressway	Delay in possession	Penalty of interest at 12% per annum; Directed to hand over possession to buyer by 21st July, 2016, failing which, the builder has to pay a penalty of Rs 5,000 per day, per flat, till the project is completed.
Amrapali Group	Liesure Park	Delay in completion of project	The court will enforce the undertaking furnished by the Group of arranging 87.28 crore to complete the project
Unitech	Aspen Green project at SAS Nagar, Mohali	Possession of plot (booked in December 2011) not given within the committed date	Refund of Rs 3.04 crore, along with 18% interest per annum.
Lodha Group and Shree Sainath Enterprises	Lodha Luxuria, Thane; Fairfield building	Apartment not delivered, and sold to third party; Non-execution of agreement to sell	Refund of the entire amount with 18% interest thereof and compensation of Rs 1 lakh.
Lok Housing & Construction Ltd	Mumbai based SRA project	Failure to start construction since 2014	To pay monthly payment of 4.3 lakh to three home buyers till the possession is given

As per various media reports 2016-2018