

Whether Society is a “Promoter” under RERA?**Udayachal Goregaon CHS Ltd vs. M/s Jaycee Homes Pvt. Ltd.**

Appeal no. AT006000000010569, Order dated 30/01/2019, MAHARASHTRA RERA TRIBUNAL

Ratio:

The fact that society is merely in the position of a land owner for a third party purchaser cannot be treated as a “promoter” under RERA and thereby cannot be liable as developer in relation to the flat purchasers.

***Facts of the case:***

The Society entered into a Development Agreement dated 15.04.2013 (**DA**) with the Developer wherein it was agreed that the Developer would redevelop the existing buildings and utilize the additional FSI/ TDR to sell the sale component to third parties. Due to the failure of the Developer to complete the redevelopment of the society, the Society terminated the DA in the year 2018. Prior to the termination of DA, third party rights were created with respect to the sale component of the Developer. The flat purchasers filed a complaint before MahaRERA against the Society and the Developer on the ground that the Agreement for sale entered into by them with the Developer are legally binding on the Society and thus either the society/ Developer should complete the construction and handover the flats to them or allow the purchasers to complete remaining construction.

Proceedings before MahaRERA Authority:

Society raised objection on the maintainability of the Complaint against it and placed reliance upon the decision of the Bombay High court in the case of *Vaidehi Akash Housing Pvt. Ltd. vs. New D.N. Nagar Co-op. Hsg. Soc. Ltd. & Ors. (2015 (3) ABR 270)*, stating that since there is no privity of contract between the Society and third party purchasers, the society is not liable to such flat purchasers.

Authority’s Decision:

The Authority held that complaints are maintainable against Society. It held that Society as the land owner and the developer engaged in the redevelopment are both “Promoter” u/s 2(zk) of the RERA Act and their liabilities are joint. It observed that by cancelling the DA, the Society regained the control and ownership of the sale component and thus is liable as a Promoter.

Dissatisfied by the said order, Society appealed before Appellate Tribunal, RERA.

Issue before Appellate Tribunal RERA:

- (i) Whether the complaint of the purchasers is maintainable?
- (ii) Whether the Society, being the land owner is a Promoter under RERA?

Appellate Tribunals Verdict:

The tribunal made the following observation:

- (i) Impugned order was an unreasoned order since it was based only on comparing definition of “Promoter” under MOFA and RERA. No reference was made to the clauses of the agreement for sale/ allotment letter.
 - (ii) No reference was made to circular no. 12 by the Ld. Member wherein the liabilities and obligations of land owner as “Promoter” was provided.
 - (iii) No convincing differentiation in the meaning of Promoter under MOFA and RERA was brought out.
- The Tribunal thus remanded the matter back to the Authority for deciding the issue of maintainability.

Acelegal Analysis:

- In the decision of Bombay High Court (*Vaidehi vs. D.N Nagar*), the Court has made the following observation:
 - (i) If there is no privity of contract of the third party purchaser with the Society, then the Society will not be responsible for any claims made by the third party purchasers.
 - (ii) No specific performance can be claimed by the third party purchasers of their respective agreement for sale except through Developer, in the absence of privity of contract with the Society.
 - (iii) DA entitles the developers to construct building/s and sell flats/premises to outsiders as an independent contractor.
 - (iv) Building constructed by the developer cannot be said to be constructed by the Society within the meaning of Section 2(c) of MOFA.
 - (v) The Society, merely being a landowner cannot be treated as a "promoter" and thereby foist the obligations of a promoter on the society in relation to the purchasers.
- The above observations were further confirmed by the hon'ble Bombay High Court in the case of *Goregaon Pearl CHS vs Seems Paryekar & Ors (22143/2019)* wherein the court held that obligations of a Developer cannot be treated as obligation of the Society in relation to the third party purchasers. It stated that there will be no liability of the Owner if not made a Confirming Party in the third party flat purchasers agreement between the Developer and the Purchaser.
- Further the court clarified that Provisions of RERA do not make any difference either and the definition of Promoter is on same lines as of MOFA.

To draw the analysis of the present case, following circulars, judgements, and definition of terms under the Act should be taken into consideration:

- MahaRERA by its earlier order dated 11.05.2017 had coined definition of 'Co-Promoter' of real estate Project wherein the land owner / society were included. The said order was replaced when a writ petition (2773/2017) challenged order of RERA on the ground that the Authority is not empowered to coin a new definition "Co- Promoter" and notify the same in absence of any statutory authority under the Act. Accordingly, the Bombay High Court directed the Authority to withdraw and replace the said order.
- Therefore vide order no.12/2017 dated 04.12.2017 read with Circular no. 13/2017 dated 04.12.2017 (said "**Circulars**") the RERA replaced the earlier order.
- By virtue of said circulars, the Authority withdrew the concept of "Co-Promoter" and provided that any individual/organization entering into arrangement with the Promoter entitled to revenue or area share shall also be Promoter. However, the liabilities of such land owner shall be as per the agreement with the Developer.
- From the understanding of the above circular it is clear that the land owners/ investors entitled to revenue/ area share are Promoters under RERA, but the liability of being such Promoter shall be dependent upon the written agreement which has been entered into by them with the Developer. The obligations of such land owner/ investor will be limited only to the extent as contracted between the parties. Thus the written agreement plays an important role in defining the rights and obligations of the landowner and the Developer.

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