

LEGALFOXES LAW TIMES

REMEDIES FOR INNOCENT HOME BUYERS

The law on real estate has not been properly organised in the past, which has left the home buyers in lurch, as they ended up paying their hard earned money in the hands of fraudulent builders. We analyse various options under prevailing laws:

- The Real Estate Regulation Act, 2016
- The Insolvency and Bankruptcy Code, 2016
- The Consumer Protection Act, 1986

PROVISIONS UNDER THE REAL ESTATE REGULATION ACT, 2016

RERA seeks to bring clarity and fair practices that would protect the interest of buyers and also impose penalties on errant builders. It enhances certain norms to enhance transparency in real estate sector. Gist of major benefits of RERA are as follows:

- **Standardized carpet area-** in the absence of standard definition of carpet area, the builders followed biased policies and calculation method to their advantage. Sec 2(k) now defines carpet area to mean the net usable floor area.
- **Reduces the risk of insolvency-** Earlier builders were free to divert the funds raised from one project to another or anywhere, in the absence of no end-use monitoring norms. But now, the builder is required to deposit 70% of the amount realized in a separated bank account to be withdrawn as per completion of project, and based on certificate of a civil engineer, architect or Chartered Accountant.

- **Rights in case of defected possession** – in case of any structural defect or any defect in workmanship, quality, provisions or service is discovered within 5 years after the possession, such defect will be rectified by the builder at no extra cost within 30 days. Similarly, buyers have been given rights in case of false promises leading to refund + interest and compensation.

PROVISIONS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Under the code the creditors are categorized into two types: **Financial or Operational**. Financial creditors includes person who have lent money to the debtor against the payment of interest, whereas Operational Creditors includes person who have established certain types of relationship with the debtor company such as the provision of goods and services, employment or Govt. dues. Therefore prior to the amendment "Home buyers" were treated as an orphan as, they were considered to be neither financial creditors nor operational creditors. The delay or default could however be intentional or unintentional such as funding issues, demand and supply situation, developer's negligence, delay in land clearance, labour availability, ground water, land. Now after this amendment, the allottee¹ of home buyers are termed as Financial Creditors.

The sums paid by the Home Buyers to a builder will be considered as **financial debt**. This enables home buyers to file petition u/s 7 of the code to start insolvency proceedings against a defaulting builder company. Further, according to section 238 of the IBC, if there is any inconsistency between IBC and another law then the IBC will prevail. In the light of same provision both the enactments i.e. RERA and IBC shall be read harmoniously to provide relief to the homebuyers and in case of inconsistency, IBC shall prevail over RERA enabling the homebuyers to approach NCLT without any hesitation.

PROVISIONS UNDER THE CONSUMER PROTECTION ACT, 1986

The widely used Consumer Protection Act had been best choice for the consumers to seek redressal of their disputes. However, the pecuniary jurisdiction has always been a matter of debate. Sometimes consumer courts were found to be highly burdened with the complaints, resulting into unreasonable delay in disposal of complaints. This delay has not encouraged consumers to take up their disputes. The tendency of consumers is that whenever there is any urgency there must be fast remedy. The delay practice has made consumer courts at par with the civil courts. The object of creating special forum under special law has been defeated. Under the law exploring multiple options at a same time is not allowed, unless the additional remedy is a criminal proceeding starting from registration of FIR against the respondent for having committed a criminal offence.

Pecuniary jurisdiction: District commission will have jurisdiction over the cases where the value of goods and services and the compensation claimed does not exceed Rs. 20 lakhs. State Commission shall have jurisdiction if value exceeds Rs. 20 lakhs but does not exceed 1 crore². The National Commission will have jurisdiction where value exceeds Rs. 1 Crore.³ However, with the amended Act, the jurisdiction has increased to Rs. 1 Crore, and 10 Crore as against Rs. 20 lakhs and Rs. 1 Crore respectively.

Arbitration: An alternative

The consumers, particularly the home buyers started looking at arbitration as an alternative remedy. Arbitration is certainly a fast remedy and has proved to be effective in most of the cases. But in respect to disputes of home buyers, the arbitration clause is so twisted in favour of builders that the innocent home buyers cannot have say in appointment of arbitrator. The builders will usually appoint an arbitrator of their own choice; hence the controlling power is vested with the builder. Although, there has been an amendment in the Arbitration Act, 2015. The amendment has inserted 7th schedule which specifically prohibits appointment of related party as Arbitrator. So, be careful while drafting such clauses on Arbitration so that the contract

² Section 17, Consumer Protection Act, 1986.

³ Section 21, Consumer Protection Act, 1986.

can be enforced. This is generally a myth that the appointing party shall conduct the affairs of arbitration. Whereas the conduct of Arbitrator is regulated and the law puts various checks and balance so that the arbitrator does not deliver biased orders, in addition to decision of arbitrator called arbitral award can be challenged in certain situations, and if found weak on the given parameters, the award can be set aside and not binding.

Therefore, with great initiatives of the current Govt. to promulgate new laws, buyers are expected to get effective remedies.