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Uttar Pradesh Apartment Act Empowering flat buyers

The Act makes it mandatory for promoters to disclose everything that constitutes the 'common areas and facilities' to an allottee before booking

Sudeepta Kr Pal

Today a typical group housing complex accommodates a bigger population than an average village of Uttar Pradesh and he life-time savings of an equal number of people are invested in it. A practical law then becomes a necessity for effective maintenance of the common assets, individual ownership, transferability and matters governing the rights and obligations of all the stakeholders - ie buyers, promoters and the development authority.

The UP Apartment Act 2010 can be effective enough. It was

enacted considering the present circumstances, especially since the 2003-04 ordinances could not be translated into an Act. Notified on March 19, 2010, it brought UP at par with rest of the NCR, replacing the UP Flat Act 1975.

Envisaging total transparency, it has been made mandatory for all promoters to make true disclosure of the land, encumbrances, plans with specifications, nature of fixtures, amenities, details of design and materials and, most importantly, the 'common areas and facilities' to an allottee before booking. This is

similar to the Maharashtra Ownership Flats Act or MOFA. It rested a most contentious issue, as to what constitutes 'common areas and facilities.' In a common man's language 'common areas and facilities' include everything inside the plot except the dwelling unit and convenient shops proposed to be under individual ownerships and possession.

The Act also reiterates in no uncertain terms that the proportionate share of 'common areas and facilities' cannot be altered after allotment, even if it is not expressly mentioned

in the instrument of transfer/allotment. The apex court in Nihalchand Laloochand versus Panchal... observed that "MOFA mandates the promoter to describe common areas and facilities in the advertisement. The 'agreement' with the flat purchaser and the promoter is also required to indicate the price of the flat, including the proportionate price of the common areas and facilities.

The UP legislators reiterated the valuable right of an allottee through the proviso that the promoter shall not make any alterations in the

plans, specifications and other particulars without the previous consent of the intending purchaser. The Supreme Court in M/s Jayantilal Investments versus Madhu Vihar Cooperative Housing Society Ltd case, dated January 11, 2007, held that once the original plans of the building are approved by the local authority and the flats are sold on that basis, the promoter/developer is prohibited from making any additions or alterations without the consent of the flat purchasers. It was held by the Supreme Court that a comprehensive project scheme has to disclose details of the plot of land where the builder is going to construct the flats. Subsequently, the Allahabad High Court in writs against Noida restrained Omaxe Infrastructure from constructing additional villas and basement stores over and above the sanctioned plan by amending it with additional FAR because no prior consent was obtained from the petitioners.

Besides setting a maximum of two years time to obtain 'completion certificate' of the project from the date of allotment agreement and two years period to remain responsible for construction and structural defect after handing over of the apartment, this public policy aptly establishes parity between rights and obligations of apartment owners who get ownership through membership of a cooperative society and those who obtained ownership in a scheme proposed by a promoter/builder, by making it compulsory for each apartment owner to become the member of the sole association of owners. This law therefore, prohibits the cre-

ation of more than one association/RWA within a project, to ensure smooth transfer of the possession of 'common areas and facilities' and its management from the builder/promoter to the association/RWA after obtaining the 'completion certificate'. But creation of a second association is prevalent. Recently one 'Competent Authority under the 2010 Act' had to order the promoter 'deemed hand over' of the common assets to the first association terming it 'unjustified' on part of a builder to raise the plea of other subsequent associations in the plot.

The 2010 Act/rules envisage the execution of deed of apartment in place of sale deed/sub lease like Delhi besides submission of a comprehensive 'declaration' by all promoters of projects having more than four apartments whether already constructed or under construction within a specified time to the competent authority. These provisions are to eliminate all ambiguity over the built-up area of the apartment, share of land, number of floors, common areas and facilities, voting right of each owner, parking details, independent areas etc. The Delhi High Court vide order dated May 28, 2010, directed that "inaction/failure of the promoters/builders in executing and registering the deed of apartment would entitle the owner of the apartment to get all the benefits of the Act". The High Court again in 2012 ordered the DDA and L&DO that "if the promoters/builders still default, execute and register the deed itself and even draw up the details of the scheme itself," if not made available in the submitted plan.

For easy integration of the existing association/RWAs

within the 2010 Act, provision has been made for the adoption and registration of the model byelaws under the UP Apartment Act 2010 by all such associations in their first meeting so that all associations of UP registered under the Societies Registration Act, 1860, operating in projects having more than four apartments shall have uniform byelaws at the earliest. The model byelaws incorporate the best practices like maximum one year tenure for four to 10 board of management, elected from amongst owners of apartments by ensuring one-third board to retire annually and prohibiting the same person not to hold the same post beyond two years. The Registrar of Societies, Lucknow, however, is yet to issue any guidelines to this effect even though this 2010 Act has an overriding effect.

The association has been duly empowered to effectively manage the common assets and distribute the common profits amongst owners besides the power to report any violation by owner/promoter to the competent authority or others as the case may be for penal action against any violation in the plot. The Ghaziabad Development Authority recently, in its counter affidavit to the PIL filed for the implementation of all the provisions of this UP Apartment Act/Rules, model byelaws and reading-down of the rules to bring delinquent builders/promoters to justice within a short period, has lauded the effort and accepted the prayer but is waiting for court orders.

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Conversion benefits for Noida

If the conversion scheme for land in Noida, Greater Noida and Yamuna Expressway is approved, owners of freehold properties who wish to better utilise portions of their property, will be able to sell individual floors

Sunil Tyagi

Land-owning public authorities which have given land on lease to allottees occasionally launch conversion schemes. Under a conversion scheme, lessees/sub-lessees of leasehold properties have the option of converting their leasehold property into a freehold property. Recently, there is much speculation over the proposal of the state government of Uttar Pradesh to introduce a conversion scheme for land falling under the jurisdiction of development authorities of Noida, Greater Noida and Yamuna Expressway. At present, properties falling under the jurisdiction of these development authorities are allotted to owners on leasehold basis. The development authorities

of Noida, Greater Noida and Yamuna Expressway have expressed their reservations over the proposal of introducing a conversion scheme.

Their main concern is that with conversion of land from leasehold to freehold in the areas falling under their jurisdiction, there would be a shortfall in revenue owing to drop in lease rent collection. The revenue shortfall would in turn hamper the provision of basic infrastructure and civic amenities and impede rapid and overall development of the region.

Nature of ownership

By virtue of being the absolute owner of the property, a person has wide powers to deal with the property at his/her discretion and as he/she deems fit. The owner

of a freehold property has unrestricted rights to transfer the property absolutely (by sale, gift, bequeath under will). He or she also can transfer certain rights in the property (eg by lease or license), subject to applicable laws in force. Thus, the owner of a freehold property holds absolute title and ownership of such property with few/no restrictions on usage and transfer of the property.

On the other hand, there are certain restrictions on the ownership, possession and enjoyment of leasehold properties imposed by the lessor (ie, the land-owning public authority). Before an owner of a leasehold property can transfer or create any rights, interest or ownership in his property, he/she is required to obtain prior permissions from

relevant land-owning authority.

Term of ownership: Unlike freehold properties, the term of ownership of leasehold properties granted under a perpetual lease deed/sub lease deed is for a specified period (for instance, 99 years). It is mistakenly feared by many that investment in a leasehold property comes with the risk of ownership of the property coming to an end on expiry of the term. On the contrary, the term of perpetual lease/sub-lease is periodically renewed for further terms by the land-owning public authority. Also, conversion schemes are usually launched from time to time.

Investment parameters: From the point of view of security of investment, both leasehold and freehold immovable properties have their own set of distinct advantages. Some persons prefer to invest in a leasehold LIG/MIG/HIG flat or plot as they are assured of a clear property title of the land-

owning public authority. In freehold properties that are usually purchased by secondary sale, there may be an element of risk in the validity of title of ownership of the seller. However, conducting a proper and comprehensive due diligence of the chain of title of the property - whether it is freehold or leasehold - and scrutiny of the property documents by legal experts can significantly minimise this risk.

Value of property

As the owner of a freehold property holds absolute title and ownership of such property with few/no restrictions on usage, transfer and enjoyment (as compared to leasehold properties), freehold properties are a more lucrative investment. Generally, freehold properties have a higher market value than leasehold properties even if both are situated in the same area. Conversion schemes are an effective mode for enhancing the value

of leasehold property.

Floor-wise sale of property: For freehold properties, the owner may transfer individual floors of the property by sale. In leasehold properties, the owner cannot sell individual floors of the property but may transfer the same by short-term lease/license. If the conversion scheme for land in Noida, Greater Noida and Yamuna Expressway is approved, the same shall have positive as well as negative consequences. On the positive side, owners of freehold properties who require funds or who wish to better utilise portions of their property, will be able to freely sell individual floors. However, this may lead to rapid influx of population in these areas and strain on the existing civic amenities and infrastructure.

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THE PROPOSAL

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