

Have you been cheated out of a bigger flat?

If you get a smaller apartment after paying the developer for a bigger one, he is liable to refund the excess amount to you

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htestates LEGAL REMEDIES

As per the prevailing market practice in the real estate sector, residential flat/apartments are sold on the basis of built-up area (BUA). Consideration towards the apartment/flat/house is payable to the builder based on the area of such apartment/flat/house. At the time of booking/allotment, the area of apartment offered by the builder is usually based on the existing building plans. However, subsequently due to certain changes in building plans, necessary structural changes or for other reasons, the actual area handed over to the buyer may differ from the area promised to him in the buyer's agreement.

As a common practice, the buyer's agreement executed between a builder and a buyer usually contains a clause that if the area promised exceeds a specified percentage, then the buyer has to pay the additional consideration.

Where the area decreases by a specified percentage, then the differential amount shall be adjusted by the builder against the final sale consideration. But in cases where the BUA delivered is less than the agreed area, many buyers have alleged that builders rarely refund the excess amount or adjust it against the final consideration paid by the buyer.

It is also pertinent to mention that even if there is no clause in the agreement mentioning the refund of excess amount/adjustment of excess amount by the builder against the final consideration, the buyer would still be entitled to a refund of the proportionate excess amount paid to the builder if the BUA handed over by the builder is less than the area offered/promised by the builder in the buyer's agreement.



Homebuyers should verify the built-up area of the flat handed over by the builder before moving in

This position was also upheld by the National Dispute Redressal Commission (National Commission) in its judgment pronounced in 2012.

In the case, the consumer/complainant was originally offered a flat having a built-up area of 714 sq ft. The built-up area was also clearly defined in the buyer's agreement. After handing over possession of the flat, based on an architect's report, who had taken the measurement of the flat, the complainant discovered that there was a shortfall in the BUA of the flat and the BUA

handed over was only 565 sq ft as against the BUA of 714 sq ft in the agreement.

The buyer/complainant filed a complaint before the district consumer dispute redressal forum (district forum), alleging that she had paid the entire amount of consideration but had been given a reduced built-up area.

The district forum ignored the architect's report that the buyer had relied upon on technical grounds. The buyer filed an appeal before the state consumer dispute redressal commission, Maharashtra State Commission.

The State Commission, in order to ascertain the true facts, appointed an independent government registered valuer and chartered engineer and architect as court commissioner to measure the flat.

The court commissioner submitted in his report that as per the agreement, the built-up area of the flat was to be 714 sq ft but the actual built-up area of the flat in possession of the complainant was of 573.83 sq ft only.

The State Commission subsequently allowed the appeal of the buyer and directed the seller/builder to refund the excess

amount to the buyer along with interest and also awarded compensation due to mental agony along with the cost of the proceedings.

The seller/builder filed a revision petition before the National Commission, challenging the order of the State Commission. However, the National Commission upheld the order of the State Commission in favour of the buyer holding that there is no illegality, infirmity or material irregularity in exercise of its jurisdiction in the order passed by the State Commission, which calls for interference in revisional jurisdiction. The revision petition was accordingly dismissed.

This case clarified the position that in the event the area handed over to a buyer is less than the area offered/promised by the builder in the buyer's agreement, the builder is liable to refund the excess amount charged from the buyer/consumer.

The challenge, however, is that very few buyers actually verify the BUA of the apartments/flats/house sold and handed over by the builder.

The author is a senior partner at Zeus Law, a corporate commercial law firm. One of its areas of specialisations is real estate transactional and litigation work. If you have any queries, email us at ht@zeus.firm.in



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LAW BOOK
Sunil Tyagi

My sister and I inherited an equal share in our father's residential property. She wants to transfer her share in my favour. How can she do so? Please advice.

— Namrata Sharma
Your sister can transfer her share in your father's residential property in your favour either by executing a gift deed in your favour for which you will not be required to pay any consideration. In case your father has not left any other legal heir other than the two of you, she may execute a relinquishment deed for which you may or may not pay her any consideration.

I am a foreign national residing in Macau and often come to India for work trips. Can I buy a residential apartment in India?

— Shanti Singh
As per Reserve Bank of India's latest notification, being a foreign national of Macau, you may not acquire/purchase residential immovable property without the prior permission of the RBI other than a lease, not exceeding five years.

My father passed away recently, without leaving a will. My mother pre-deceased him and I am his only son. We are a Hindu family. Now, his brother is staking claim to a residential property belonging to my father where I still reside. Does he have a right to do so?

— Naveen Chand

From your question we presume that the property is a self-acquired property of your father, in which case your father's brother is not entitled to any share in the said property.

I had purchased a newly constructed flat as an original allottee. Although it has only been less than a year since I received possession, cracks have begun to occur in the walls. Is the builder entitled to charge me for carrying out repair works?

— Sangha Shah

As a standard practice, most buyer agreements provide for a defect liability clause wherein the developer undertakes to rectify and repair, at his own cost, any construction and other material defects that may appear within a defined period following handover of the property. This period usually varies between one to two years after possession, provided such damage is not a result of the owner's acts/omissions. You may check whether you are covered by this defect liability clause.

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htestates CHEQUE BOOK Harsh Roongta

My father retired from the postal department. Can he get a home loan?

— Shikhar Gupta

For availing any credit facility, the applicant has to provide proof of consistent income. Since your father has already retired, the lender will not be in a position to offer him a home loan on the basis of his pension income. It would be advisable that any other earning family member joins him as a co-borrower so that he can get the loan.

I have taken a home loan from a bank for ₹7 lakh and the property is in my name but my brother gives the EMI. He now wants the property transferred in his name. What is the process to transfer the property in his name?

— Santosh Yadav

In the absence of any information we have assumed that your brother is not a co-borrower to the home loan and that he is informally paying your loan EMI.

In the given circumstances, you can definitely transfer the house in your brother's name with the bank's consent, but this will have stamp-duty and registration charges implications.

Your brother can apply for a fresh loan and can get a home loan on the basis of his income and past repayment history, if any.

Also, since this is a transaction is between two related parties, the bank will be extra cautious while granting you the loan and may subject the property to rigid valuation norms.

I had a credit card with a credit limit of ₹25,000 some five years back. Due to financial constraints, I was unable to make payments on time.

When I started working with an established company and was earning well, I decided to pay off

the amount. When I checked for the outstanding amount, it stood at ₹50,000 which I was not able to afford. Subsequently, I tried to settle the outstanding amount by paying an amount of ₹10,000 but was refused by the bank.

I am now looking for a personal loan to service a house lease but banks have refused. Is there a way I can get it?

— Soami Iyer

Before granting you a loan, banks will first obtain your credit report from the Credit Information Bureau (CIBIL). Your default will certainly reflect in the report and will continue to stay in their record for at least seven years because of which you will face difficulties in getting a loan or a credit card even after clearing off your

dues. Even if you try and settle the amount now, your credit report will continue to show that you had delayed payments in the past. And if you try and settle it at a lesser amount, the record will show that the bank had to write off some amount. This will have negative implications.

With such long delay and default, your credit score is bound to be very low making it difficult for you to get any credit facility from the lenders.

Please get the issue resolved as soon as it is possible as persistent default is hurting your credit rating and credit history badly.

You can try and rebuild your credit history by tak-

ing a secured credit card (secured against FD) or loan against tangible moveable security such as fixed deposits /jewellery/shares/units of mutual funds/life insurance policy with high surrender value etc where the lender can give you a loan despite your adverse credit history.

By repaying such a loan regularly, you will gradually improve your credit history. This is a very slow process and it will take at least a couple of years before you can improve your credit record and be eligible for a regular loan or a credit card.

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Buying a house? Do some sleuthing

The nature of property determines the specific type of due diligence that you require to undertake

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Property buyers are often warned that they must conduct thorough due diligence before investing in any property, and that they should not rely solely on the verification process done by banks while they are processing a home loan request. This is sound advice, especially in the current times when many buyers have found themselves in troubled waters after making property purchase decisions without doing their homework.

What does due diligence mean with regard to property purchase? Basically, it is a thorough investigative process, the objective of which is to determine whether or not a certain real estate option is safe to invest in. The process requires a focus on different elements, depending on whether one is purchasing a ready-to-occupy property or one which is under construction. A due diligence for redeveloped properties also has specific areas to be focused on.

Due diligence for ready-to-occupy properties

Get all details pertaining to the developer's credibility. Make sure you check the developer's delivery track record of past projects. There are many aspects that directly affect the level of risk, but are never revealed to buyers. The required information needs to be assimilated at a local level, preferably by someone who has been residing in the locality for a while.

Ask the developer for the approved drawings of the project, a copy of the IOD (intimation of disapproval) and completion certificate and a clear land title. Ensure that the property is free of litigation and any kind of associated debt. Also, establish the existence of a proper society. If one is buying a second-hand property, proper transfer and re-registration should be done before hand over. The documents required for registration of a



Those wanting to buy a house should check for the approved usage of property and any pending litigation

GET STARTED ON A FACT-FINDING MISSION

- In case of ready-to-move-in properties, check the developer's delivery record of past projects
- Ask the developer for the approved drawings of the project, completion certificate and a clear land title
- For properties that are under construction, get an idea of how far the project has progressed
- Find out if the builder has a free and clear ownership of the land in which the project is located
- The buyer also needs to find out if the project has an intimation of disapproval or IOD. This is a set of instructions that a developer needs to comply with so that he can legally construct the project
- The IOD in most cases is valid only for one year and needs to be reissued if the project has not been completed in a year's time
- The new buyer must also ensure that the seller is surrendering all rights and claims after the property is reconstructed

residential flat, apart from the sale deed, will include a letter from the society that reflects the number of floors in the building, the year in which the building was constructed, the apartment's built-up area of the apartment and the number of lifts in the building.

The homebuyer should have a proper checklist in place; this must include the approved usage of the property, notices of any pending or threatened litigation or governmental action relating to the real estate or seller, any applicable condominium documents, service contracts, all construction-related documents including warranties, as-built plans and specifications etc.

Due diligence for under-construction properties

If the project is under construction, get an accurate idea of the project's progress. This is especially true if the property is being bought directly from the developer. When no property advisor is involved in the transaction, the risk of falling prey to a deceptive projection of the project's development progress multiplies manifold.

The buyer needs to establish whether the builder has free and clear ownership of the land on which the project is being built. An agreement between builder and the original owner of the land is not sufficient. The project also needs to have an IOD. This

is a set of instructions that a developer needs to comply with so that he can legally construct the project. The IOD is valid for one year and needs to be reissued if the project has not been completed in a year's time. The project also needs to have a commencement certificate in place.

While considering a pre-launch option, it is even more necessary to establish the trustworthiness of the builder, especially in terms of his track record for transparent dealings and compliance with legal formalities.

Due diligence for redeveloped properties

What are buyers to do if they buy properties which are to be demolished or have already been demolished. Two scenarios are made possible. In the first, for the building to be demolished, the buyer moves into the property, which is vacated when other society members leave at the time of actual redevelopment.

However, if the building has already been demolished, the permission of both the society and developer are required since, though money has changed hands, the transaction is incomplete until the property has been reconstructed and registered in the new owner's name.

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