Should homebuyers who invested in pre-RERA projects get their agreements revised?

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As the Real Estate (Regulation and Development) Act, 2016 completes a year, homebuyers should be aware that the Act does not specify whether the agreement to sell with existing allottees of ongoing projects require execution of a new or revised agreement for them to avail of benefits under the legislation. But this does not mean that buyers who bought property before RERA will not be entitled to benefits that new buyers will. Existing buyers who booked units before May 1, 2017 can stake two types of claims – one under the pre-RERA regime and the other in the post-RERA regime.

The absence of any clear cut-off date for the ongoing projects gives rise to other complications. Essentially these complications may arise as existing agreements and documentation in such cases tend to be developer-friendly, and hence (maybe) in conflict with the spirit of RERA. Despite the state rules providing templates of the agreements to sell, RERA, as well as most of the state rules, do not specify whether re-executing transactions – with the existing allottees of ongoing projects – is mandatory. Without an express provision, such requirement can be safely assumed to not apply, says a white paper by Assocham and Thought Arbitrage titled RERA as Growth Impetus – Does the promise hold out on the ground.

However, in cases where the existing documentation is developer friendly (a very likely scenario), or contains commercials that may not be implementable under the RERA regime (such as assured returns to consumers), it may be worthwhile for developers and consumers alike to execute fresh agreements, which are compliant with RERA. Clarity is needed in this aspect as ongoing projects currently constitute a substantial part of the jurisdiction of the regulator. This remains a grey area. Otherwise, there is always a possibility of the multiplicity of litigations. Similarly, customer refunds in these cases can also pose further challenges – both in legislative and legal terms says the white paper.

Though there is no express provision in RERA to alter terms of contract between homebuyers and promoters in case of ongoing projects, it is understood that statute will prevail in case there is any contradiction between private contract and law. Thus, if the contract provides interest on delay in handover to home buyers by promoters at the rate of say 5 percent, the home buyers are entitled to get interest on delayed handover at such rates as provided by RERA under Section 18 which is much higher than what is provided in the private contract of most of the promoters, says Abhay Upadhyay, president, Forum For People's Collective Efforts and member, Central Advisory Council, RERA, ministry of housing and urban affairs.

Avoid settling matters out of court

Also, in order to avoid giving RERA rate of interest to home buyers in cases of delay in handover, RERA authorities have adopted the practice of forcing out of court settlement by and between home buyers and promoters. The matter is settled somewhere between contracted rates and RERA rates of interest between both the parties obviously under pressure from RERA authorities which should be avoided at all cost since it is not healthy judicial practice and also setting bad precedent, he warns.

RERA authorities will do great justice for the suffering home buyers by expressly notifying that all promoters should comply with section 18 of RERA voluntarily and that promoters should start paying interest on delay in handover at RERA prescribed rates to home buyers of ongoing projects every month till his unit is finally handed over. This will reduce unnecessary litigation and also expedite the justice delivery mechanism under RERA, he says.

Dual claims: A pre RERA claim and a post RERA claim

RERA is a prospective legislation. Undoubtedly, all ongoing and new projects, where booking is made after May 1, 2017, agreement or any other document executed has to be as per the rules. However, the Act does not require execution of new or revised agreements with the existing buyers of ongoing projects. But it does not mean that the existing buyers will not be entitled to benefits of RERA. The existing buyers shall be entitled to all those benefits as the new buyers will be entitled to under RERA.

The only difference is the claims of new buyers, in any case, will be related to period post 01.05.2017 as their agreement will be of the date on or after 01.05.2017. Whereas in case of existing buyers who booked the unit before 01.05.2017 and have agreements also of prior to the said date, their claims can be for two types of periods, one for pre-RERA and the other for post RERA, says Sunil Tyagi of Zeus Law.

For post RERA claims, irrespective of the agreement being developer friendly, the existing buyer will be entitled to all the benefits available under RERA. However, for any claim relating to the period prior to RERA, the existing buyer may not be able to claim relief/benefit under RERA successfully as the terms and conditions relating to the period prior to coming into force of RERA cannot be governed by RERA provisions. This will mean for any grievance for the period prior to 01.05.2017, existing buyers may not be entitled to relief/benefit under RERA provisions but for post 01.05.2017, the existing buyer will be entitled relief/benefit under RERA provisions.

Thus, even if new agreements are executed by the developers with the existing buyers as per RERA provisions, the mute question will be about the effective date of such agreements. It is unlikely that such agreement will be made effective retrospectively i.e., from a date prior to 01.05.2017. Therefore, the new agreements may govern terms and conditions for the period after 01.05.2017. In such situation also, the existing buyers of ongoing project will remain in the same situation as they were without signing the new agreement. They will have two different claims under two different agreements, while the later may be entitled to benefits provided under RERA, the former may not be, adds Tyagi.