

Chapter I

Ownership Flats

Introduction

The concept of flat ownership is the product of acute shortage of land for construction of accommodation resulting in ever increasing land prices particularly in the urban areas. The concept involves ownership of a part of building as opposed to the ownership of the whole and is made possible by construction of multi-units building on a piece of land in which different persons are able to exercise ownership rights in individual units, subject to certain conditions in the interest of peaceful and meaningful enjoyment of the property and avoidance of conflict with the developer of building and other owners of the flats in the same building.

1.0.1 Flat ownership is different from joint ownership / joint tenancy or co-ownership in which one or more persons hold legal rights in the property. Such ownership arises when two or more persons acquire any property, by purchase or otherwise, jointly without indicating that they are to take separate interest therein. Unity of title, unity of interest, and unity of possession is the basic feature of joint ownership. Each owner has the same or identical interest in the same property in extent, nature and duration. No single flat owner has any separate share in the property. Flat ownership is also different from the system of

coparcenership under Hindu Law where persons acquire interest in ancestral properties owned by the Joint Hindu family by birth, which common interest can be identified and converted into separate property by partition of the joint family as per the provisions of the Hindu Law. On partition of property under joint ownership or coparcenership, the co-owners or the coparceners begin to own a part of the property instead of the whole of it and if such partition is not by metes and bounds, each co-owner or the coparcener holds the property as tenant-in-common in which while there is unity of possession, each owner gets title and interest over his respective share in the property.

1.0.2 The system of co-ownership or coparcenership, (till partition), involves interest of all in the same property without identification of their part within the whole property. The system of part ownership was not common in India. It was Section 7 of the Transfer of Property Act, 1882 which recognized, for the first time, the right of a person, competent to contract and entitled to transferable property, to transfer such property either wholly or in part and either absolutely or jointly in the circumstances, to the extent and in the manner as prescribed in law. This provision, though enabling part ownership of a whole building, did not prove to be of much practical value as generally there were no identifiable independent units within the building. Structures designed as bungalows or *havelis* were incapable of being used as a building comprising of several independent livable units. The construction of building having different self-contained flats or residential apartments which could be owned and enjoyed separately and independently did not exist. This piquant situation, with the growing necessity of independent units and enabled by the provisions of the Transfer of Property Act, 1882 resulted in the construction of building with independent self-contained dwelling units

By K.K. Ramani & N.C. Jain

generally referred to as flats capable of being owned and enjoyed by the respective owner(s) or purchaser(s) thereof, as heritable and transferable property. The system was mainly pioneered by the city of Mumbai in India and became popular after independence.

1.0.3 An apartment or a flat in a building is not separate from the building. It is recognized as separate property only in the flat ownership system. Thus it has been held that a flat cannot be separately acquired under the Land Acquisition Act as separate property (*Bijay Singh Surana vs. First Land Acquisition Collector, Calcutta AIR 1990 Cal 246*).

Ownership of Flats in England

1.1.0 Strangely enough, while recognizing the Ownership of part of the property in India, the British Government did not do it in its home country England. The Law of Property Act, 1925 prohibits such joint ownership. As per the Act, legal estate is not capable of subsisting or of being created in an undivided share in a land. Section 34(1) of the Act clearly makes an undivided share in land incapable of being created. A limited exception is provided in respect of conveyance executed in favour of more than one person in which case, it operates as if the land is conveyed to the grantees or, in case of grant in favour of more than four persons, to the first four named grantees as joint tenants in trust for the persons interested in the land. Same is the position where the property is transferred by bequest or by any other method for the benefit of more than one person. No severance of joint tenancy so as to create tenancy in common in land is permissible. As a result, flat ownership system could not be possible in England.

1.1.1 With constant pressure of population after the second world war, high living cost and scarcity of accommodation,

some way had to be found within the existing legal framework and consequently, the flat holding system in England came to be based on leasing of flats instead of full ownership basis.

Ownership of Flats in Europe

1.2.0 In European countries, the system of flat ownership has prevailed since long, though the same was unregulated. This could not have continued for long and, therefore, different countries of the Continent brought about legislation for regulation since the beginning of 20th century which are different in details from each other, the basic features being that right of ownership in flats are rights of co-ownership against prohibition on such co-ownership rights in England.

Ownership of Flats in USA

1.3.0 America has the system of flat ownership since the latter half of the 20th century. The system, however, is based on apartment ownership controlled and managed by condominium of flat owners. The system of apartment ownership is prevalent in India along with the system of ownership by co-operative housing societies, companies or other legal organizations of flat buyers. The Maharashtra Apartment Ownership Act 1970 permits such ownership system and is largely based on American model law. Other States in India also have similar Acts under which the apartments are managed by condominium of flat owners. In America, the first State to pass such legislation was Carto Rigo followed by other States. In 1962, the Federal Housing Administration drafted a model statute which has been adopted by most of the States in USA.

Flat ownership laws in India

1.4.0 As mentioned, the Transfer of Property Act 1882 recognised for the first time, the right to transfer property either

wholly or in part and either absolutely or jointly. Even with the legislation enabling ownership of part of building including flats therein, the real spurt in construction of such buildings was noticed after the second world war when cities like Mumbai and others were flooded with population from outside and accommodation problem became too acute. In Mumbai rented premises being too insufficient were not available at affordable rent. The Rent Control Acts were passed by different States which made renting of new premises uneconomical. The circumstances of acute scarcity resulted in growth of building constructions based on system of flat ownership to avoid the Rent Control Acts. The city of Mumbai was the pioneer in such construction activities which was followed by other States.

1.4.1 In matter of law also, for regulating such construction activities it was the State of Maharashtra which took the lead. The State also passed legislation enabling the purchasers to have ownership rights by making the apartments heritable and transferable, if submitted to the relevant legislation. Other States followed and passed laws broadly on similar lines. A mention of legislative development in Maharashtra State is made herein below which will broadly indicate the nature of such laws passed by certain States.

Maharashtra Ownership Flats Act, 1963 (MOFA)

1.5.0 The Ownership Flat system though instrumental in the growth of Mumbai City gave rise to certain unhealthy practices. Many enterprising persons taking advantage of the prevailing acute shortage of housing accommodation, particularly in congested places like Greater Mumbai, started constructing and selling residential flats on ownership basis, collecting large sums of money even without a clear title over the land. Those who had the title over the land transferred only possession of building

without passing on clear title over the land. Absence of any law recognising flats as a separate legal holding and regulating the construction, sale, management and transfer of title therein, including management of common facilities for smooth running of the system and proper enjoyment of living accommodation, began to be felt. When the malpractices of the builders became too rampant and the need for necessary regulation became very imperative, the Government of Maharashtra appointed a committee headed by Mr. B.B. Paymaster, Secretary Law and Judiciary Department to examine the question in all its aspects and make suggestions for preventing and remedying such malpractices and irregularities and thereby ensuring protection of the buyers of such ownership flats against such malpractices. The recommendations made by the committee became the basis of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963 (No. XIV of 1963) referred to as MOFA in further discussion.

1.5.1 The Maharashtra Ownership Flats Act of 1963 (MOFA) was the first of its kind in India which was later followed by the other States in India. These Acts, *inter alia*, were The Karnataka Apartment Ownership Act, 1972, The Karnataka Ownership Flats (Regulation of the Promotion, Construction, Sale Management and Transfer) Act, 1972; The Uttar Pradesh Ownership of Flats Act 1975; The Delhi Apartment Ownership Act, 1986; The Gujarat Ownership Flats Act, 1973 and The West Bengal Apartment Ownership Act, 1972, The Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act 1987 and The Haryana Apartment Ownership Act, 1983.

1.5.2 The Maharashtra Ownership Flats Act, 1963, as is evident from the title of the Act and the Preamble thereto, aimed at providing, during the period of shortage of housing, for the

By K.K. Ramani & N.C. Jain

regulation of the promotion of (i) the construction, (ii) sale (iii) management and (iv) transfer of flats taken on ownership basis in the State of Maharashtra. The Act does not create any rights and is merely intended to prevent the abuses and malpractices which were rampant in the real estate sector. It is not, therefore, a substantive statute but only a regulatory one. Being an Act aimed to regulate the activities of the builders during the acute shortage of housing, it was initially to be in force for a period of five years. As there was no let up in the housing shortage, which situation kept aggravating, the same was extended from time-to-time and was last extended upto 31st March, 2005. Subsequently, the Act was made perpetual by the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) (Retrospective Extension of Duration and Amendment) Ordinance 2005 which became an Amending Act No. 37 of 2005, w.e.f. 1-4-2005.

1.5.3 MOFA in order to protect the interest of the purchasers obligated the promoters to furnish the necessary prescribed information to the purchasers: prohibited him from accepting amount in respect of the flat beyond the prescribed percentage without getting the agreement for sale executed and registered: prohibited him from creating any charge on the property after the flat is booked: obligated him to adhere to the plans and the specifications as approved and disclosed to the purchasers: and to use the amount collected in respect of maintenance etc. for those purposes only. The Act also obligated the promoter to get a co-operative Society or company or any other form of organization registered after a prescribed number of flats are sold and to convey the title over the land and building and the common area to such society, company or other organization of purchasers. Most of other obligations were also cast on the promoter. The law laid down consequences by way of penalties and prosecutions in case of defaults by the promoters.

By K.K. Ramani & N.C. Jain

To take care of the promoters reluctance in the matter of formation of societies or any other organization of purchasers and to convey title to such organizations, the Act provided for unilateral registration of societies and deemed conveyance under which, in case of promoter's failure, the purchasers could move to the Competent Authority which could order registration of conveyance deed even without the involvement of the land owner and/or Builder /Developer.

1.5.4 The Act mainly confines itself to regulating the activities of promoters of the building from the stage of booking of the flats to the stage when the organisation of buyers is made the legal owners thereof Thereafter matters are governed by the Acts governing these organizations viz. the co-operative societies, companies or condominiums.

1.5.5 MOFA deals with and regulates the promotion of construction of flats, their sale, management and transfers. It does not lay down or give legal status of a flat owner in relation to his flat as also in relation to the organization formed by the flat buyers viz., the co-operative society, company or any other association of which the flat buyer was to become a member. Such relationship is governed by the respective legislations, i.e., The Maharashtra Co-operative Societies Act, 1960, The Maharashtra Apartment Ownership Act, 1970 or The Companies Act, 1956. MOFA provided the obligations, duties and responsibilities of the promoter/builder in relation to the activities of construction, sale management and transfer of flats as well as the duty of the Flat Purchasers.

Maharashtra Apartment Ownership Act, 1970 (MAOA)

1.6.0 As mentioned earlier, the MOFA virtually ceases to have relevance once the promoter conveys his title over the land and building to the organization of flat buyers namely,

By K.K. Ramani & N.C. Jain

co-operative society registered under the Maharashtra Co-operative Societies Act or to the company under Companies Act or any other organization governed by the respective Act. The title therefore vests in these collective entities in which flat buyers are members who get the occupation rights by virtue of their membership. Another alternative which gives ownership rights to flat buyers is for the promoter/builder to submit the property to the provisions of Maharashtra Apartment Ownership Act, 1970.

1.6.1 The Maharashtra Apartment Ownership Act, 1970 provides for the ownership of an individual apartment in a building to the flat purchaser and to make such apartment heritable and transferable property. Heritability and transferability of the apartment is the basic feature of holding the property governed by this Act, which distinguishes it from holding the rights over property through the Co-operative Societies or the Companies. The essential differences between holding the properties through the organization of flat purchasers under MOFA and directly under MAOA are as under:

- (i) The flat owners under MAOA are independent owners of their flats, whereas under MOFA the members of society/company exercise their rights through the society or the company, which remains the legal owner thereof. Even though a condominium is formed under the MAOA, such condominium does not exercise the right of ownership and does not have corporate existence. It exists only for management of common facilities and regulating the mutual relation of members.
- (ii) Under MOFA, flat forms part of the building, which is a unit of common ownership with the society/company,

By K.K. Ramani & N.C. Jain

whereas, under MAOA each flat is an independent unit of ownership, though part of the same building.

- (iii) Under MOFA, a flat owner as member of the society/ company structure has only a right of occupancy and it is such right of occupancy, which is heritable and transferable. As against this, under the MAOA, the flat owner is also the owner of the physical structure of the flat entitled to all the rights of an owner.
- (iv) The right of a flat owner to transfer his occupancy right in the flat is subject to the approval of the society formed in accordance with provisions of MOFA whereas there may not be any restriction on the right of transfer by an apartment owner under MAOA.
- (v) A transfer of right by a flat owner in a co-operative society formed as per the requirement of MOFA is possible only to a member of the society. In case the buyer is not an existing member, he is required to be admitted as member. An apartment owner under MAOA is not subject to any such restriction.
- (vi) Under the Society/company system prevailing under MOFA, the building and land belong to the society/ company as a legal entity whereas the flat owner under MAOA is not only the owner of the flat but is also the owner of the proportionate land married to the building and also proportionate common areas as specified by the declaration of apartment ownership.
- (vii) The land and building is transferred to the society/ company by a single deed of conveyance but in case of MAOA, a separate deed of transfer is required in respect

By K.K. Ramani & N.C. Jain

of each flat including proportionate interest in the land married to it and proportionate common area.

Maharashtra Housing (Regulation & Development) Act, 2012

1.7.0 As mentioned, MOFA was enacted to provide relief to the flat purchasers against sundry abuses, malpractices and difficulties related to construction, sale, management and transfer of flats. The Act and the rules were made with a view to prevent effectively the abuses and malpractices of promoters/developers. Although in a period of more than five decades it remained in operation, the housing activities became regulated to some extent, law was not sufficiently effective in protecting the interest of flat purchasers in the absence of an effective implementing arm to enforce its provisions. It was recognized that the aggrieved flat purchasers could only approach the Consumer Forum or the Civil Courts for acts of omission or commission of the builders. The Government of Maharashtra, therefore, passed Maharashtra Housing (Regulation & Development) Act, 2012 with the objectives of introducing better control and ensuring fairness and transparency in the construction, sale, management and transfer of ownership flats. The Act sought to introduce the system of registration of construction projects and provided for setting up of a Housing Regulatory Authority for regulating the activities of promoters which included the obligation to display all material facts relating to the project on the website of the authority. It also provided for setting up of a Housing Appellate Tribunal to decide appeals against the decisions, orders and directions of the Regulatory Authority.

1.7.1 With the coming into force of the Act and from the date or dates to be notified by the Maharashtra Government, the Maharashtra Ownership Flats Act, 1963 was to be repealed. The Government notified section 1, 18, 19 and few other provisions

By K.K. Ramani & N.C. Jain

of the Act including provisions enabling establishment of Regulatory Authority and Appellate Tribunal. Before the entire Act could come into force, the Union Government passed an Act called Real Estate (Regulation & Development) Act 2016, which repealed the said State Act viz., The Maharashtra Housing (Regulation & Development) Act even before the State Act could be fully operative. The repeal of the State Act was probably considered necessary to avoid duplicity of legislation in the State of Maharashtra dealing with the same objects as the Act passed by the Central Government is applicable throughout India except the State of Jammu and Kashmir.

1.7.2 As mentioned, there was already a regulatory Act called Maharashtra Ownership Flat Act 1963, (MOFA) which was to be repealed by its successor legislation the Maharashtra Housing (Regulation & Development) Act 2012. With the repealing Act itself having been repealed by the Central legislation, the Maharashtra Ownership Flats Act, 1963 will continue to remain in force in the State of Maharashtra leading to duplicity of legislation on the same subject and resulting complications of administration and compliance. There is also Maharashtra Apartments Ownership Act 1970 which will also continue to remain in force. As a consequence, Maharashtra State will have the Central legislation viz. Real Estate (Regulation & Development) Act 2016, the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963 and the Maharashtra Apartment Ownership Act 1970 dealing with ownership flats in Maharashtra.

Other States which have their own legislation in line with MOFA/ MAOA of Maharashtra, will also be in similar situation of duplicity of governing laws.

By K.K. Ramani & N.C. Jain

The Real Estate (Regulation & Development) Act, 2016 (RERD)

1.8.0 The Union Government being aware of rampant abuse and malpractices involved in real estate sector has enacted this Act which seeks to promote and regulate the activities of construction and sale of buildings, apartments in the building – residential or commercial – and plots carved out of land throughout the country, except the State of Jammu and Kashmir. It is to be noted that this Central Act will regulate residential as well as commercial apartments and buildings and also plots in a township project. The Act being the subject matter of this book, various aspects of the legislation are discussed in the chapters that follow.

Objects and reasons of the RERD Act

1.9.0 The preamble to the RERD Act states the purpose and objects of the legislation as under:

“to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.”

1.9.1 The Act is to serve the main purpose of protecting the interest of consumer in real estate sector by-

- i) establishing the Real Estate Regulatory Authority
- ii) regulating and promoting the real estate sector through such Authority

By K.K. Ramani & N.C. Jain

- iii) ensuring sale of plot/building/apartment in efficient and transparent manner
- iv) establishing adjudicating mechanism for determination of compensation payable under the Act and resolution of grievances
- v) establishing the Appellate Tribunal to hear appeals against the orders of the Real Estate Regulatory Authority and the adjudicating authority

Application of the Act

1.9.2 The Act extends to whole of India except the State of Jammu & Kashmir

The application of the Act is not affected by any other Act that may be in force in the Union of India or any State dealing with same or similar objects. Section 88 of the Act clarifies that the provisions of the Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force dealing with the similar objectives. In case of contradiction with provisions of any other law in force, section 89 lays down that the provision of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

1.9.3 The provisions of Sections 88 & 89 raise an issue of applicability of Acts which were in force and continue to remain in force in certain States. A notable example is that of MOFA in Maharashtra which will also exist for the same purpose of regulating the construction, sale management and transfer of flats. When the two Acts are compared, there are provisions which are common in nature; which are common but differ in details, which exist in the RERD Act but not in MOFA such

as provisions for setting up of Regulatory Authority and Real Estate Appellate Tribunal. Some of the provisions which exist in MOFA but not in this Act such as provisions for unilateral registration of societies and deemed conveyance. While application of the Central Act is secured by the provisions of section 88 & 89 of the Act, an issue remains as to the application of provisions of State Act e.g., MOFA in Maharashtra, which are different in details and which do not find place in the Central Act.

1.9.4 A view can be taken – and the same finds support from section 89- that the Central Act will override the provisions of the State Act. With this view , the Central Act will prevail over the State legislation in matters where there are contradictory provisions in the State Acts and the State Acts will remain applicable when there is no contrary provision in the Central Act.

1.9.5 The Act will come into force on such date as may be notified by the Government of India. Different dates may be appointed for different provisions of the Act and such provisions will come into force from the date notified for these sections. Any reference to the commencement of the Act in these sections shall mean commencement of the Act on the dates when these sections come into force. In pursuance of the powers vested, the Government of India has notified coming into force of 69 out of 92 sections of the Act from 1st May, 2016 setting in motion the process of making necessary operational rules and creating institutional infrastructure. As far as these 62 provisions are concerned, the Act has commenced from 1st May, 2016. These provisions relate to the definitions, Real Estate Regulatory Authority, Central Advisory Council, Real Estate Appellate Tribunal and miscellaneous provisions including the rule making power to the Appropriate Governments and the power

to make regulations to the Regulatory Authority. The operation of Section 92 will result in the repeal of the Maharashtra Housing (Regulation and Development) Act, 2012.

Rule making power

1.9.6 The RERD Act empowers the appropriate Governments i.e., the Governments of the State and Union Territories to appoint the Regulatory Authorities and the Appellate Tribunal in their respective States within one year of the commencement of the Act and also to frame rules for giving effect to the provisions of the Act within six months from the date of commencement. Thus, even when the legislation is enacted by the Central Government, the responsibility of implementing the same has been entrusted to the respective State Governments who are also to frame the rules within the broad parameters of the provisions of the Act. Since the legislation dealing with immovable properties are not uniform in States, the measure will enable the States to adjust the working of the Act to conform to the prevailing legal practices in that State while, maintaining uniformity at macro level throughout the country.

1.9.7 As mentioned the Government of India *vide* notification No. SO 1544 (E) dated 26.04.2016 has brought into force 59 sections out of 92 sections which are-

Section 2 - Definitions

Sections 20 to 39 - Provisions relating to Real Estate Regulatory Authority

Sections 41 & 42 - Provisions relating to Central Advisory Council

Sections 43 to 58 - Provisions relating to the Real Estate Appellate Tribunal

By K.K. Ramani & N.C. Jain

Sections 71 & 72 - Provisions relating to adjudication

Sections 73 to 78 - Provisions relating to finance, accounts, audits and reports

Sections 81 to 91 - Miscellaneous provisions including power of Appropriate Government to make rules and of regulatory authority to make regulations

Section 92 - Repeal of Maharashtra Housing (Regulation & Development) Act, 2012

Since these provisions have come into effect from 1st May, 2016, the time of one year for setting up RERA and REAT by the Appropriate Governments has commenced from 1st May, 2016. This will mean that these authorities will have to be set up by 30th April, 2017 and the RERAs will then frame regulations to carry out the purpose of the Act within three months of their establishment.

1.9.8 The Act has not commenced so far in respect of provisions not contained in the notification. The left out provisions mainly include provisions for registration of the projects, provisions dealing with the duties and responsibilities of promoters, allottees and real estate agents and provisions laying down penalties. The commencement of the Act so far as these sections are concerned will be from the date they are notified and rules in regard to such provisions will have to be framed within six months of such commencements. So far as 69 notified sections are concerned the Appropriate Governments will be required to frame rules to give effect to these sections within six months from 1st May i.e., by 31st October, 2016.

● ●

By K.K. Ramani & N.C. Jain