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DEVELOPMENT OF REAL ESTATE SECTOR UNDER THE TRANSACTION OF LEASE

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***Abstract*:** An owner of an immovable property enjoys different nature of ownership rights one of which is the transfer of an exclusive use and enjoy the property. If a person is being transferred the right of enjoyment of property by the owner for a fixed period or indefinite period expressed or implied it is said to be Lease. Lease is of different kinds one which is long term lease. A Lessee who develops the land for real estate purpose can be regulated under Real estate (Regulation and Development) Act-2016.

The real estate is one of the largest industries for economy and employment in India. Even though the sector has acquired great significance it was unregulated sector till the enactment of Real estate (regulation and development) Act 2016, herein after named as RERA Act. It is mandatory for all states to establish Real estate regulatory authority herein after named as RERA and Real estate appellate Tribunal herein after named as REAT. Since this act has been enacted to protect the interest of home buyers thereby developing the industry, the higher courts tend to bring all kinds of allotments by way of transfers under the controlling mechanism of this Act.

An allottee includes purchaser who is the purchaser of a plot, apartment or building purchased the right of property in the nature of free hold or lease hold. This paper analyses the nature of sale as to freehold and lease hold, how the transfer of lease hold right amounts to sale, and how far the allottee of lease hold right can be given protection under RERA ACT. At the same time when the developer who is a lessee had developed the land and allotted to a person, whether it comes under the purview of RERA ACT needs to be addressed.

Key words: **perpetuity, long term lease, sale, allottee, free hold or lease hold**

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[1] MANU/MH/2362/2018

INTRODUCTION

Real estate is a kind of property comprising land and building, matters and resources relating to land, immovable and permanent in nature, and the interest created or vested in real property. In the law of property the term' Real' denotes land benefits arising out of land such as rights over building and air above and below the land surface etc. Rights of owning and possessing involved with the concept of Real estate. Real estate can be natural or manmade.

There are three main categories of real estate such as commercial, residential and industrial.

Real estate is considered as an investment of hard-earned money combined with increasing need for housing, and it becomes imperative for nuclear families. The real estate has been one of the most unregulated sectors in India, even though it is one of the major economic and employment sectors. The lack of coordination, professionalism and standardization prevailed in the sector left the affected homebuyers without remedy. There was situation only few aggrieved homebuyers approached the consumer forum for remedy against the promoter, but in consumer forum the remedy is possible which is only curative in nature. Not only the homebuyer affected, but the transactions in the unorganized sector ending in many kinds of real estate crimes. For regulating the Real Estate Sector, Real Estate (Regulation & Development) Act,2016, for the bereft of convenience hereinafter called RERA Act came into existence.

In the real estate projects, the developer or promoter is developing the project in various categories holding over possession of the land such as,

a) The developer may be owner of the land thereby having possession and develop the project for sale;
b) the developer may be assigned with power of attorney from the land owner to develop the land under joint development agreement
c) The developer may be assigned with long term tenancy in respect of land and power of attorney to develop the property and power to sell the constructed units to the prospective identified buyers.

The subject to be introspected in this paper is ' lease transactions from the perspective of Real Estate (Regulation & Development) Act.2016'.

DEFINITION CLAUSES UNDER RERA ACT

Allottee "allottee in relation to a real estate project, means the person to whom a plot, Apartment or building as the case may be, has been collected, sold whether as (freehold or leasehold) or otherwise transferred by the promoter and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be , is given on rent"[2]

Development "means carrying out the development of the immovable property or other Operations in, on, over or under the land or the making of any material Change in any immovable property or land and includes redevelopment."[3]

Promoter "a person who constructs or causes to be constructed an independent building

[2] Real Estate (Regulation & Development) Act,2016, (Act16 of 2016), s.2(d).

[3] Id., s.2(s).

Or a building consisting of apartments or converts an existing building or a Part thereof into apartments for the purpose of selling all or some of the apartments to the other person and includes his assignees"[4]

Promoter	"any other person who acts himself as a builder, colonizer, contractor, Developer, estate developer or by any other name or claims to be acting as The holder of the power of attorney from the owner of the land on which the building or apartments is constructed or plot is developed for sale"[5]
Real Estate Project	"means the development of building or a building consisting of apartments or converting an existing building or a part thereof into apartments or the development of land into plots or apartments as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easements, rights and appurtenances belonging thereto."[6]

LEASE – UNDER VARIOUS STATUTES

In jurisprudential contours of property, the concept of ownership and possession is very significant. Ownership of a right is incorporeal. The residuary character of ownership allows the owner to part with 'the right of use and enjoyment' for the purpose of lease.

Definition of Lease: "A lease of immovable property is a transfer of a right to enjoy such property made for a certain time express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value , to be rented periodically or on specified occasion to the transferor by the transferee, who accepts the transfer on such terms."[7]

As the economic life of human being expands, the lease transaction got diversified. As a result, statutory tenancy laws have been enacted. In the land reform measures adopted by the rulers, cultivation of land on lease is the origin of the development of real estate.

In the Real Estate Sector, the place occupied by lease of immovable properties plays vital role. Without lease concept, the real estate sector would be incomplete. The principles of lease are enshrined in the Transfer of Property

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[4] id., s.2(zk)(i)

[5] Supra note 2, s.2(zk)(v)

[6] Supra note 2, s.2(zn)

[7] The Transfer of Property Act,1882 (Act 4 of 1882), s.105

Act which provides different tenures of lease extending from a year to perpetuity. In the course of evolution of tenancy laws, the recent Central legislation, .was the guiding statute ,based on which all States and Union Territories are required to enact respective tenancy laws with object to regulate the tenancy for speedy redressal mechanism in adjudication of disputes and to maintain uniform procedure. To regulate the rights and liabilities of landlord and tenant, Model Tenancy Act,2021 has been formulated in agreement with the Draft National Urban Rental Housing Policy,2015. This Model Tenancy Act focuses on tenancy on monthly rent on the basis of terms of the agreement entered between the landlord and tenancy. Hence the RERA Act exempts this kind of tenancy contemplated under the Model Tenancy Act from its purview.

The lease instruments are required to be mandatorily stamped depending upon the tenure of the lease as contained in the Indian Stamp Act.[8] The lease exceeding one year needs to be registered under Registration Act.[9]

OVER VIEW OF RERA ACT

The RERA Act envisages regulation and adjudication mechanism of the Real Estate Sector by establishing Regulatory Authority in every State and Union Territory.

The Regulatory mechanism exercised by the Authority is to be discussed in the following paragraph :

1. Registration of real estate projects and agents,

2. Ensuring the progress of construction by obtaining quarterly progress report from the promoters[10].

3. Accountability of promoter in maintaining separate project account for the amount received from the allottees.[11]

4. Ensuring clear title of the property [12]

5. Ensuring completion of the project within the time as promised by the promoter

6. Enhancing transparency in the real estate sector, uploading of documents and certificates, licenses and approvals and completion certificate in the website of RERA for enhancing transparency and creating trust and confidence in the minds of the home buyers.[13]

7. Enabling formation of allottees welfare association.

8. RERA Act provides speedy redressal mechanism in adjudication of complaints adopting summary procedure.

PROVISIONS OF RERA ACT GOVERNING LEASE

The RERA Act implies the aspects of lease in the definition clause [14]. The provisions of RERA Act are applicable to sale of plots, buildings, apartment which are residential or commercial in nature. The RERA Act expressly in defining

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[8] Indian Stamp Act,1899, sch .I

[9] Registration Act,1908, s.17

[10] Supra note 2, s.11.

[11] Supra note 2, s.(2)(l)(D)

[12] Supra note 2, s. 4(2)(l)(A) ,(B)

[13] Supra note 9

[14] Supra note 2

the term 'allottee' includes the development of real estate project on lease hold land. But it further interprets that lease in respect of apartment, building or plot given on rent are not included in the definition of the allottee as contemplated in the RERA Act. The inclusion of real estate development on lease hold land is further substantiated on reading of functions and duties of promoter as provided by the Act. The legislator applying their wisdom included leasehold development. In such development of lease hold land the promoter shall be duty bound to obtain the lease certificate in favour of allottee or in favour of association of allottee. [15] The promoter shall be responsible to pay all the outgoings until he transfers the possession of the units to the allottees. The outgoings include ground rent with all other charges. It could be inferred from this context that the interest of leaseholders in respect of such allotment as said supra are under the protective cover of the provisions of RERA Act[16]. When the RERA Act interprets the rights and duties of allottees , the duty of such allottee has to pay the ground rent after the transfer of the unit allotted[17]

RERA ACT EXEMPTS MONTHLY LEASE – WHY?

One of the key elements of real estate is lease. Though RERA Act specifies the lease in the nature of long term, it exempts lease on monthly rental basis. When the real estate legislation is meant for regulating real estate sector which includes lease as a major happening, the short term lease on monthly basis is expressly exempted. The reason for the exclusion of periodical monthly lease from the RERA Act is based on the principle of transfer of absolute ownership by way of sale. By express inclusion of sale, the RERA Act impliedly excludes the monthly lease. From the definition clause provided in the RERA Act, the provisions of RERA are also extended to lease transactions, when the project is developed on leased hold land, the exclusion of lease on monthly rent could be justified on weighing the rights and liabilities of lessor and lessee flown from the substantive law. Rights and liabilities of Lessor and Lessee could not be dealt under real estate law which is procedural in nature, whereas tenancy laws are ensuring substantive rights of the parties. Hence those rights and liabilities of landlord and tenant are covered under special statute under tenancy law.

The legislators excluded the monthly lease from the purview of real estate legislation, otherwise if it is included, it would warrant unnecessary interference in the rights of ownership resulting adverse impact not only on residential rentals but also with greater force on commercial rental regime in the economy. This will lead to chaos in the real estate system of society and adjudicatory mechanism.

LEASE DEEMED TO BE SALE

While the legislators enacted RERA Act, they carefully included long term lease under its purview, though the word 'long term' has not been explicitly provided in the Act. If it is analysed to find the reasons behind the inclusion of lease within the ambit of RERA Act, the developers in the metropolitan cities tend to structure the sale through lease. In order to bring all those transactions of sale under the disguise of lease , the legislators included such provisions under the clutches of RERA Act. These provisions ensure protection to homebuyers who are allotted units on leasehold land on the same footing as the allottees stand on freehold. Now, it is a settled law that the provisions of RERA Act are applicable to lease (development on leasehold land) as decided by the High Court of Bombay narrated in the following paragraph, which is the authority holding the field.

LAVASA CORPORATION LTD. Vs. JITENDRA JAGDISH TULSIANI & ORS[18]

M/s Lavasa Corporation Ltd/ Appellant promoter promoted a project in vast tract of land parcel in the hill town of Lavasa, near Pune. The respondent/allottees have been allotted apartments on lease of tenure of 999 years in the project. The respondent allottees paid 80% of sale price of apartment to the appellant M/s Lavasa Corporation Ltd.

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[15] Supra note 2, s.11(4)(c).

[16] Supra note 2, s. 11(4)(g)

[17] Supra note 2, s. 19(6)

[18] MANU/MH/2362/2018

The respondent allottee also paid necessary stamp duty and registration charges on the value of prevailing market price of the property. In the meantime, after the advent of RERA Act, the appellant promoter registered the project with Maharashtra Real Estate Regulatory Authority herein after stated as MAHA RERA. The appellant promoter delayed the construction of project due to some noncompliance of mandatory environmental norms raised by the appropriate authority. Eventually the project came to a halt.

The respondent/allottees approached MAHARERA by filing complaint [19] seeking refund and compensation[20] before the Adjudicating Authority [21] who dismissed the complaints by holding that lease agreements do not come under the purview of RERA Act and thus MAHARERA had no jurisdiction. Aggrieved by this order, the respondents/allottees filed the first appeal before Maharashtra Real Estate Appellate Tribunal. The Tribunal on hearing both sides, ruled that the long term lease on the development of leasehold plot very much comes under the purview of RERA. It further held that the appellant promoter was estopped [22] from claiming non applicability of provision of RERA for their project which was already registered with MAHARERA. The appellant/promoter filed second appeal before the High Court of Bombay whose findings are analyzed as follows:

1. The High Court considered the object and reasons of RERA Act and viewed the transactions as not agreement of lease but agreement of sale.

2. The High Court has taken into consideration of the facts of the case . In this case, 80% of the consideration sum paid to the Appellant /promoter, the annual rent fixed is Rs.1/- , moreover the Respondent/allottee have paid registration charges and stamp duty on the market value of the said apartment. The term of the lease agreement is for 999 years.

3. The High Court settled the issue by interpreting the title or nomenclature is not a criteria to decide the nature of the document, but to read the entire instrument as a whole in order to ascertain the true intention of the parties. Though the title is lease, but the intention of the parties is sale.

4. The transaction is transfer of capital assets and hence it amounts to sale. The High Court relied on the precedents held by Madras High Court[23] and the Supreme Court of India[24]

5. The High Court interpreted the definition of 'allottee' as contemplated in RERA Act and arrived to the conclusion as such that the agreement of rent is exempted from the provisions of RERA Act, but the lease effect to transaction of sale would be under the ambit of RERA Act.

6. The High Court applied the Haydon's Rule of Suppression of Mischief[25]. Here the mischief is nomenclature of the instrument. To suppress this mischief and to provide remedy under RERA Act to the allottees, the High Court construed the nomenclature of the agreement of lease as agreement of sale. If it is not construed as sale, the High Court viewed that "it becomes a case of unjust enrichment on the part of the promoter".[26]

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[19] Supra note 2, s. 31

[20] Supra note 2, s. 18

[21] At present, the Adjudicating Authority do not have jurisdiction to try refund claims. In the case,' New Tech Promoters Vs. State of U.P., the Supreme Court held that The Adjudicating Authority under RERA shall confine to adjudge compensation only, The refund claims to be adjudicated by the Authority.

[22] Indian Evidence Act,1872, s.115

[23] Commissioner of Income Tax, Tamilnādu III Vs. M/s Rane Brakes Lining Ltd,Chennai

[24] R.K.Palshikar (HUF) Vs. CIT, M.P, Nagpur and Bandhra : MANU/SC/0381/1988 : 1988(172) itr 311

[25] Supra note 17 at 12 Para 58

[26] Supra note 17 at 12 para 59

7. The High Court gave a finding that a lease could be considered as a long term based on its tenure and on the circumstances where a substantial amount of consideration is received by the developer.

8. In view of the decisions held by the High Court , the interests of allottees who have booked apartments under lease hold are very much protected under the provisions of RERA Act.

LEASE TO BE LONG TERM – WHEN?

The yardstick to measure a lease to be long term is ascertained based on dual test with references to Income Tax Act, 1922 and Indian Stamp Act,1899. The High Court placed two tests for application of the provisions of RERA in respect of long term lease,

First, long term leases on the basis of its tenure; The stamp value of instruments matters to decide whether lease to be long term. According to Stamp Act, if the term of lease agreement is more than 3 years, the stamp duty leviable on the instruments of conveyance is applicable to the instruments of lease.

Second, substantial amount of consideration is received by the developer in lieu of transfer of capital assets which includes lease hold land and superstructure built thereupon.

The terms of lease fulfils either one of the tests as said supra, it is considered to be long term lease.

CONCLUSION;

A key analytical point emerged from the research is the allottees, who are allotted flats, apartments or units on leased hold land, their rights are protected not only under the provision of RERA Act, but also under the Transfer of Property Act and City Tenancy Protection law[27]. For ensuring the grievances against the builder in reference to the construction and provision of amenities, etc, the provisions of RERA Act would come into play. Whereas on expiry of lease in respect of leased hold land, the disputes arising out of those matters are to be dealt with the aid of Transfer of Property Act and Tenancy laws on the basis of the terms agreed upon in the lease deed.

In recent unreported judgment of Madras High Court[28], the long term lease wherein monthly rent is specified is excluded from the application of provisions of RERA. In this case the Hon'ble High Court interpreted that the rights of lessor and lessee are enshrined in the Transfer of Property Act which are substantive in nature which could not be curtailed simply by application of procedural law or executive order passed by any authority. Though the provisions of RERA Act and the decision of High Court of Bombay do interpret the lease amounting to sale, in the context of protecting the interest of the allottee who have invested their money over the superstructure, it is undisputable that the lease subsists between the parties.

On expiry of such lease, the far-reaching implications arise such as,

Whether the claim of the allottees (Lessee) over the superstructure after expiry of lease is sustainable ;
Whether the superstructure to be vested with the landlord;
Whether the lessee (allottee) in respect of claim over the superstructure is under protective cover of City tenancy protection laws prevalent in some States ;

The Hon'ble High Court of Bombay observed that the vacuum in the RERA Act to be filled by applying the principles 'Legislative futility to be avoided so long as interpretative possibility permits[29]. In interpreting the Act, the Hon'ble High Court held that the long term lease with substantial amount of consideration as premium would be subjected within the purview of the Act. It is the need of the hour for the legislators to take into account of the decision of the High Court so as to amend the provisions of RERA Act.

[27] The Madras City Tenants' Protection Act,1921 (Tamil Nadu Act III of 1922)

[28] S.M.Syed Abdul Khader Vs. The Sub Registrar & Others in W.P.28488 OF 2022

[29] Supra note 17 at 14 para 66