

INVESTORS IN REAL ESTATE PROJECTS TO HAVE EQUIVALENT LIABILITY AS PROMOTERS

Authored by

Madhav Rastogi, Partner,
Head- Real Estate Practice

Dakshika Sarbhoy, Associate



In a recent order pronounced on June 30, 2022, by the Maharashtra Real Estate Regulatory Authority (“MahaRERA/Authority”) in the matter of ‘Rare Township Private Limited vs IIRF India Realty VIII Ltd’, the investor IIRF India Realty VIII (“IIRF”), which had made investments in Rare Township Private Ltd. (“RTPL”) has been put in the same bracket as the management of the company because MahaRERA held that IIRF shall be covered in the definition of ”promoter” as defined under the Real Estate (Regulation & Development) Act, 2016 (“RERA/Act”).

BACKGROUND

The Complainant who was a builder and developer of a real estate project namely ‘Rising City’ filed a complaint before MahaRERA, accusing its



investor IIRF, for delaying the project and scuttling the raising of further finances for development and completion of the project.

RTPL argued that by way of a contractual arrangement i.e., Share Subscription & Shareholder's Agreement ("SSHA"), IIRF had secured a board seat with RTPL and also held affirmative voting rights in many matters of RTPL including expenditure or spending above Rs. 25 lacs and raising of further debt. Additionally, it was submitted by RTPL that IIRF was an equity holder in RTPL and had the power to veto the decisions made by the management of RTPL. RTPL pointed out that all the above reasons led to delay in the construction of the project which was beyond the control of RTPL.

On the other hand, IIRF argued that they cannot be covered under the definition of "promoter" under Section 2(zk) of the Act as they neither had a share in the sale proceeds nor there was any sharing arrangement for saleable area.

ISSUE BEFORE MahaRERA

Whether an investor of a real estate project could be considered a Promoter under the RERA Act by virtue of its contractual rights?



MahaRERA'S DECISION

MahaRERA examined the definition and role of the promoter as defined under Section 2(zk) of the Act. Section 2(zk)(i)[1] defines “promoter” and includes anyone who constructs or causes to be constructed an independent building or a building consisting of apartments etc. MahaRERA emphasised that the legislature had not stopped at defining “promoter” as a person who constructs; but had widened the scope of the definition by also including in the definition, “a person who causes to construct”.

MahaRERA further delved the dictionary meaning of the word ‘causes’ used in the statutory definition and observed that the term “causes” “implies the entity who becomes the reason or the instrument to trigger a particular action. The trigger does not necessarily mean an affirmative action but also becomes a cause for an action not being taken. The term “causes” is thus not limited to just causing something to be done but goes beyond to include causing something **not to be done** or causing something to be done in a particular manner.”

MahaRERA highlighted that the execution of the project cannot be done without the consent of IIRF as they hold an affirmative vote on certain key management decisions and observed that IIRF by exercising its affirmative vote can cause the construction of the project and by holding back its affirmative vote or abstaining from the meeting, prevent the completion of the project.

[1] a person who constructs or causes to be constructed an independent building 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 other persons and includes his assignees;



Additionally, MahaRERA emphasised on Clause No.14 of the SSHA wherein the consent of the investor is required for incurrence of expense of Rs.25,00,000/- and above. Given the scale and size of real estate projects, the amount was meagre and MahaRERA felt that such a condition was an obstacle in the development of the project.

MahaRERA also admitted in its order that provisions like the ones which are contained in the SSHA are important and critical to protect the interests of IIRF or any other such investor, but for the authority, the interests and protection of the customers is paramount. MahaRERA in its order did observe that amongst the two litigating parties, the role of the complainant (RTPL) is to execute and deliver the project and the role of IIRF was to finance and fund the project.

MahaRERA cautiously exercised limited jurisdiction by not getting into detailed analysis of the SSHA, however it placed reliance on some of the key provisions of the same to gather the meaning of promoter. The Authority observed that in for a party to be tagged with the label of being classified as a “promoter”, it is important to identify the ‘actors’ who may cause or who may restrict the development of the project. The MAhaRERA observed that though IIRF itself was not in the role of actually constructing the project, but it did exercise power which could prevent the construction of the project. Thus, by exercising its rights in the SSHA, the investor was able to decide the future course of the project. Thus basis the foregoing, MahaRERA held that IIRF did fall in the definition of “promoter” under Section 2(zk)(i) of the Act.



Additionally, MahaRERA specifically pointed out that all the liabilities arising out of a breach shall fall upon both the parties putting them at par with each other. However, the RERA authority mentioned that it shall not be appropriate that investors of all the real estate projects are to be treated in a similar manner and that this order becomes a precedent for all, it clarified that whether an investor would fall in the definition of “promoter” shall be examined on a case by case basis.

CONCLUSION

That while in the above order, MahaRERA alluded to the objectives of the Act and indicated that rights of homebuyers and protection of their hard-earned monies was the reason for enactment of the Act and it cannot be lost sight of, but at the same time set alarm bells ringing for the investor/lenders of real estate projects who would now be required to plan their investment in a manner which does not bring them at par with the risk and liability held by a promoter in a real estate project. In the event, the said judgment is challenged, it will be interesting to see how the Appellate Tribunal strikes a balance between the rights of the investors, developers, and the homebuyers. A startling view was taken by the Haryana Real Estate Regulatory Authority (HARERA) in the matter of ‘Deepak Chowdhary vs PNB Housing Finance Ltd’, wherein they identified a project lender as a “promoter”. The matter is pending under appeal.



We agree with the view of the RERA authority given that for someone who controls the management and affairs of the company, it is unfathomable why such a person should not be considered as a promoter. However, this is also an interesting order for lenders who though do not participate in the regular affairs of the company but try to control the project with tight grip through their very detailed lending

documents. It would be important for the courts at some point to distinguish between those provisions which are important and relevant for a lender to exercise the supervisory control over the project, but does not put them in the definition of “promoter”.



Reach out to the authors:
madhav@amicusservices.in
dakshika.sarbhoy@amicusservices.in

Disclaimer

The write-up is for information purposes only and readers should not act on the basis of this information without seeking professional legal advice.

DELHI . NOIDA. MUMBAI