



**HRERA VIEWS ON THE LENDERS RIGHTS IN REAL ESTATE PROJECTS**

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## HRERA VIEWS ON THE LENDERS RIGHTS IN REAL ESTATE PROJECTS

A recent order passed by the Haryana Real Estate Regulatory Authority, Gurugram ("**Authority**") in the case of *Deepak Chowdhary V. PNB Housing Finance Ltd. & Ors*<sup>1</sup> concerning the rights of allottees vis-à-vis banks/financial institutions has opened up a Pandora's box. The intention of the legislature behind enacting the Real Estate (Regulation and Development) Act, 2016 ("**Act**") was to establish a Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to balance the rights of allottees, flat buyers, etc. as against the developers or promoters of the real estate projects but this order has by touching upon the rights of the lenders added a new dimension.

In the aforesaid matter, a complaint was filed by a home buyer against a proposed e-auctioning to be carried out by PNB Housing Finance Ltd, a lender, to recover dues on account of default in repayment of the loan granted for the development of a real estate project by the name of Supertech Hues.

The Authority while dealing with the said matter elucidated on certain aspects including but not limited to the ambit of definition of promoter provided under Section 2(zk)(i) of the Act, the rights of allottees vis-à-vis the rights of lenders, the obligation upon the promoter under Section 15 of the Act.

The foremost issue dealt by the Authority was regarding the scope of the definition of the promoter provided under the Act. The relevant excerpt of the definition of the "promoter" under Section 2(zk)(i) of the Act is as follows:

"(zk) "promoter" means-

- (i) *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**; or*
- (ii) *....."*

*[Emphasis supplied]*

The Authority while dealing with the said issue observed and discussed that a lender causes the project to be constructed by giving construction loans to the developer and the developer also assigns its rights in the project to secure such loan. Basis this, the HRERA Gurugram deduced that banks/financial institutions fall within the ambit of the definition of the promoter.

The Authority also delved into the provision of Section 15 of the Act concerning the obligation of promoter before transferring or assigning majority rights in respect of a project to a third party. As per Section 15 (1) of the Act, it is mandatory for the promoter of a real estate project to obtain prior written consent from the two-third allottees and written approval of the Authority before transferring or assigning majority rights and liabilities in respect of a real estate project to a third party.

In light of the said provision, the Authority took the view that though they do not bar auctioning of the project by banks/financial institutions and enforcement of its security for recovery of its dues under the provisions of the SARFAESI Act, 2002 however, banks/financial institutions will have to follow the procedure of approval

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<sup>1</sup> Order dated 11.09.2020 passed by Haryana RERA Gurugram in Complaint Case No. 2145 (earlier 2031) of 2020

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prescribed under the Act which would entail the requirement of two third consent from the allottees and prior written approval of the Authority.

The decision of the Authority is somewhat different from what the Maharashtra RERA Appellate Tribunal held in the case of *Xander Finance Private Limited V. Mr. Trivesh Pooniwala & Ors*<sup>2</sup> which allowed protection of rights of the lenders. The Authority in its own wisdom has passed the order in the Supertech case against PNB Housing Finance, however, it has thrown up a plethora of questions and an immediate need of striking a balance between the interest of allottees and lenders. The startling decision passed by the Authority also demands a deep dive into the interplay of various laws bearing impact upon the rights of allottees vis-à-vis rights of lenders concerning a real estate project to better comprehend the current situation which we shall look at in the coming article.

- *Ms. Disha Goyal (Associate) and Mr. Madhav Rastogi (Partner)*

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<sup>2</sup> Order dated 19.03.2019 passed by Maharashtra RERA Appellate Tribunal in Appeal No. 000600000010939