

## Developments in the Apartment and Urban Real Estate Laws in India\*

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### *Abstract*

*Condominium laws in India have been in existence since 1963, with the earliest condominium legislation in the state of Maharashtra. Most states in India have their own separate legislations for condominiums; however, the principles upon which these state legislations rest are based on the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. In recent times, there have been efforts to revamp the rights and obligations of apartment owners, real estate developers and other stakeholders through the Maharashtra Housing (Regulation and Development) Act, 2012 and the Real Estate (Regulating and Development) Bill, 2013, which was passed by the Indian Parliament in March 2016.*

*This paper is divided into three parts. The first part argues that while different states have their own respective state laws relating to the transfer and administration of condominiums, such states follow the same principles developed in the State of Maharashtra and for all intents and purposes, there exists a standardised set of rules relating to the transfer and administration of condominiums. The second part of the paper 'Overview of Apartment Laws in India' describes the development of apartment laws in India including a detailed discussion of the apartment ownership, transfer and administration law in India. The third section of the paper discusses a landmark judgment which laid the basis for wide sweeping changes in the way the real estate*

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*industry is regulated. It further discusses the salient features of the Real Estate (Regulating and Development) Bill, 2013, the proposed central legislation for the regulation and development of the real estate industry in India.*

## **I. Introduction**

Property law in India is largely inherited from the British Common Law, with a few indigenous adjustments. The law relating to the transfer, ownership and registration of property may be central or federal in nature. Entry 6 of List III of Part XI of the Constitution of India allows both the Central Government as well as individual State Governments to legislate and regulate the transfer, ownership and registration of property. This dual nature of legislative authority manifests itself in a number of state-enacted statutes which deal with the ownership of apartments, flats or condominiums. These are as follows:

- Andhra Pradesh- The Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987
- Assam- The Assam Apartments (Construction and Transfer of Ownership) Act, 2006
- Bihar- Bihar Apartment Ownership Act, 2006
- Delhi- The Delhi Apartment Ownership Act, 1986
- Gujarat- Gujarat Ownership Flats Act, 1973
- Haryana- The Haryana Apartment Ownership Act, 1983
- Himachal Pradesh- Himachal Pradesh Apartment Ownership Act, 1978
- Jharkhand- The Jharkhand Apartment (Flat Ownership) Act, 2011

- Karnataka- The Karnataka Apartment Ownership Act, 1972 and the Karnataka Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer). Act, 1972
- Kerala- The Kerala Apartment Ownership Act, 1983
- Madhya Pradesh- The Madhya Pradesh Apartment Ownership Act, 2000
- Maharashtra- The Maharashtra Housing (Regulation and Development) Act, 2012 and the Maharashtra Apartment Ownership Act, 1970
- Odisha- The Odisha Apartment Ownership Act, 1982
- Punjab- The Punjab Apartment and Property Regulation Act, 1995
- Rajasthan- The Rajasthan Apartment Ownership Bill, 2013 (pending enactment)
- Simandhara- The Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987
- Tamil Nadu- Tamil Nadu Apartment Ownership Act, 1994
- Telangana- The Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987
- Tripura- The Tripura Apartment Ownership Act, 1986
- Uttar Pradesh- Uttar Pradesh Apartment (Promotion of Construction, Ownership, and Maintenance) Act, 2010
- West Bengal- The West Bengal Apartment Ownership Act, 1972 and West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993

The earliest of these state legislations were the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (now repealed by the

Maharashtra Housing (Regulation and Development) Act, 2012) which provided for the regulation of private housing developers and the Maharashtra Apartment Ownership Act, 1970 which confers apartment ownership status<sup>1</sup>. As a result, regulations pertaining to apartment ownership in most of these states mentioned above set out principles originating from the Maharashtra state law. Consequently, references to legal principles statutory provisions are based on the Maharashtra state law. Where relevant and necessary- particularly in cases where a State legislature has made a departure from the provisions of the Maharashtra State law- references have also been made to other state laws, particularly those applicable to the metropolitan areas of Delhi, Chennai, Kolkata and Bangalore.

It is interesting to note that the Delhi Apartment Ownership Act, 1986, while enacted, has been kept in abeyance, much to the vexation of apartment owners in Delhi<sup>2</sup>. A new bill replacing the 1986 Act has been promulgated at the Delhi Legislative Assembly and awaits enactment. While the Maharashtra state law is also undergoing a change with the enactment and subsequent notification of the Maharashtra Housing (Regulation and Development) Act, 2012, the new act retains the essential principles of the erstwhile and now-repealed Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

## **II. Overview of Apartment Laws in India**

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<sup>1</sup> Biswajit Das and Ashis Kumar Pani, *Real Estate Market: New Economy, New Business*. (Excel Books, 2006), p 188.

<sup>2</sup> Gaurav Bhatnagar, 'Implement Apartment Ownership Act' (8 July 2012) New Delhi *The Hindu*, available at: [http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/implement-apartment-ownership-act/article3615126.ece\\_\(accessed on 12 October 2014\)](http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/implement-apartment-ownership-act/article3615126.ece_(accessed on 12 October 2014)).

## A. Background

### 1. Historical Development

The Constitution of India allows the Central Government and State Governments to pass laws on various matters from time to time. The issue of property is one such matter on which both the Central and State Governments may pass laws. While there is a central legislation on the transfer of property, which covers rights of possession, ownership, use and transfer of all immoveable properties in general, there is no central legislation specifically on the ownership and transfer of condominiums<sup>3</sup>. However, a number of states have passed laws relating to the ownership of apartments, including - Maharashtra Housing (Regulation and Development) Act, 2012, the Maharashtra Apartment Ownership Act, 1970, the West Bengal Apartment Ownership Act, 1972 and the Delhi Apartment Ownership Act, 1986.

At the same time, relationship *inter se* apartment owners are also regulated through the formation of co-operative societies. The Co-operative Societies Act, 1912 is the central legislation giving a generic overview of the workings of the co-operatives. Various states also have laws dealing with co-operatives respectively like the Maharashtra Co-operative Societies Act, 1960, Pondicherry Co-operative Societies Act, 1972, Karnataka Co-operative Societies Act, 1959, Delhi Co-operative Societies Act, 1972 etc.

The Transfer of Property Act, 1882 governs specific transfers of immoveable property only. However, it does not exhaustively codify the law relating to transfer of property. Specifically, the Transfer of Property Act, 1882 refers to transfers of immoveable property made during the

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<sup>3</sup> Condominiums are referred to as 'flats' or 'apartments' in India, following the British usage of the term. In this report, the three terms may be used interchangeably.

lifetime of the transferor (inter vivos) but excludes the transfer of property to a successor upon the death of the property owner. While the term immovable property is not defined, it refers to anything that is permanently embedded in or fastened to the ground<sup>4</sup>, including an apartment.

The Transfer of Property Act, 1882 was prepared and passed in pursuance of the policy of the then British Government of India to pursue an enactment of a self-contained Civil Code of India. Prior to 1882, the state of laws relating to transfer and ownership of property was chaotic and fragmented<sup>5</sup>. Procedural legislations at the time directed British established courts, particularly in the Presidency Towns of Bombay, Madras and Calcutta, that where there was no specific rule pertaining to the matter in question courts would decide matters according to justice, equity and good conscience. This was construed to be a general authorization to apply rules of English law, provided that such rules were found appropriate to Indian circumstances<sup>6</sup>. Consequently, a number of rules pertaining to English property rights were transferred to India as part of the Transfer of Property Act, 1882.

However, with a sharp rise in post-war population levels and the ever growing need for personal housing, apartment ownership became and continues to be a popular mode of property ownership, especially in urban India. The Transfer of Property Act, 1882 in itself, takes into account land to be divisible upon its surface and therefore does not accurately consider the diluted ownership of apartment owners upon the underlying land. Further, the concept of restricted ownership, in that the apartment owner cannot make unbridled changes - structural or otherwise- to the apartment. Further, the title to the underlying land may not vest in the

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<sup>4</sup> See General Causes Act 1897, s. 3(26) and *Duncan Industries v State of UP* (1995) 36 (1) CLR 380.

<sup>5</sup> *Thumuswamy v. Hossain Rowthen* ILR 1 Mad. 1 (PC).

<sup>6</sup> *Warden Seth Ram v Luckpathy Royjee Lallah* (1862) 9 Moors Indian Appeals 303.

apartment owner, even in a diluted, indivisible form at all. It may instead vest in a co-operative society or body corporate created to organise the apartment construction itself. Growing urbanisation necessitates modifications in traditional legal property rights. These changes in socio-economic forces gave rise to a fresh direction to the law of property in the form of apartment or flat ownership legislations.

The need for a balanced urban growth was given considerable urgency in the Fourth Five Year Plan (1969-74)<sup>7</sup>. The Plan stressed the need to prevent further growth of population in large cities and need for decongestion or dispersal of population.

In the 1970s, through to the 80s, a number of state legislations were passed, responding to the needs of urban residents, now increasingly taking up apartment ownership. Particularly in high density metropolitan cities, the Maharashtra Ownership of Flat (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, the Maharashtra Apartment Ownership Act, 1970, the West Bengal Apartment Ownership Act, 1972 and the Delhi Apartment Ownership Act, 1986 were passed. These legislations regulate the process of promotion, construction, sale, management and transfer of apartment as well as confirmation of apartments as heritable, transferable and mortgageable property and to address aspects related to management of the property.

At the same time, the mechanism of apartment ownership is controlled through formation of co-operative societies. The Co-operative Societies Act, 1912 is the central legislation giving a

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<sup>7</sup> Planning Commission of India, Government of India 'Chapter 19: Regional Development, Housing and Water Supply' (1969 – 1974) 4<sup>th</sup> Five Year Plan available at: <http://planningcommission.nic.in/plans/planrel/fiveyr/index4.html> (accessed on 9 November 2014).

generic overview of the workings of the co-operatives. At the same time various states have laws dealing with co-operatives respectively like the Maharashtra Co-operative Societies Act, 1960, Pondicherry Co-operative Societies Act, 1972, Karnataka Co-operative Societies Act, 1959, Delhi Co-operative Societies Act, 1972 etc.

Co-operative Societies or the Co-operative Movement in India is not contemporary but it has its roots in the pre-independence period. The co-operative movement in India can be divided into two periods<sup>8</sup> (a) co-operative movement from the early period up to independence or the pre-independence period and (b) from independence to present day or the post-independence period. The pre-independence period can be further divided into four phases (i) Initiation Stage (1904-1911), (ii) Modification Stage (1912-1918), (iii) Expansion Stage (1919-1929) and (iv) Restructuring Stage (1930-1946). Even before the co-operative societies came into existence formally there was practice of cooperation in various activities in India. The agricultural condition in India was not great as there were famines occurring and with no existence of institutions for providing finance. There had been proposal of establishing agricultural banks since 1858 but finally steps were taken when the same was recommended again in 1901 by the Famine Commission. This led to the establishment of the Cooperative Credit Societies Act, 1904. Improvement over this Act was fine by the Cooperative Societies Act, 1912 and after this cooperative societies were formed for houses also like the Madras Cooperation Union in 1914 and similar institutions came up in Bengal, Orissa, and Punjab etc. Slowly the co-operative structure moved from being just catering to agricultural credit activities to other non-agricultural credit activities as well where they performed better. As time progressed the importance of co-

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<sup>8</sup> National Cooperative Union of India, Co-operative History, available at: <http://www.ncui.coop/history-coop.html> (accessed on 24 June 2014).



operative society increased as the Cooperative Planning Committee set up in 1945 realized that the cooperative societies were suitable for democratization of economic planning.

In the post-independence period co-operative development received a boost and the Planning Commission emphasized on the development of the co-operative societies for economic and political development, where the adopted co-operative method of organization to cover all aspects of community development and for setting up of urban cooperative banks, industrial cooperatives of workers, consumer cooperatives and, for the purposes of this report, housing cooperatives as well<sup>9</sup>.

Post liberalized India saw a further boost to apartment ownership with rising incomes of the Indian middle class. This also led to the creation of a number of large corporations involved in real estate development, particularly in the housing sector.

It must be noted, that condominiums are almost exclusively used in urban areas and that too for residential purposes. On occasion, businesses may own their own commercial, office or industrial complexes upon acquired land, although this is more prevalent for large corporations. Commercial, office and resort condominiums are usually leased and not owned. Offices of smaller businesses and resort spaces are also leased in conjunction with a number of services provided by the developer, including security, concierge, HVAC, electricity, water and data access.

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<sup>9</sup> Gurmukh Ram Madan, *Co-operative Movement in India* (2<sup>nd</sup> Reprint ed, Mittal Publications, 2007), pp 336-337.

Mooring spaces for boats and yachts, hotels and caravan-sites are all subject to lease and there is little or no evidence to show the usage of India's condominium or co-operative laws in such situations. Given that a vast majority of Indians (nearly 84%)<sup>10</sup> prefer to cremate, rather than bury their deceased, graveyard spaces are purchased and retained indefinitely. The concept of graveyard condominiums has not been introduced in India as yet.

## *2. Dogmatic Basis of the Indian Condominium Regime*

In India, there is no central legislation dealing with ownership of flats or apartments and their management. Each of the States in India has a separate legislation for governing this threefold relationship. Most States have the Flat Ownership Act such as the Maharashtra Housing (Regulation and Development) Act, 2012, the West Bengal Apartment Ownership Act, 1972, the Karnataka Ownership (Regulation of the Promotion of Construction, Sale, Management and Transfer) Flats Act, 1972, the Gujarat Ownership Flats Act, 1973, etc. dealing with construction, sale, management of apartments and respective Apartment Ownership Acts of these States like the Maharashtra Apartment Ownership Act, 1970 dealing with transferability and mortgageability of the flats. Certain states have just one act dealing with all these aspects like the West Bengal Apartment Ownership Act, 1972, the Haryana Apartment Ownership Act, 1983, the Kerala Apartment Ownership Act, 1983, the Orissa Apartment Ownership Act, 1982, the Delhi Apartment Ownership Act, 1986 and others. The Maharashtra Act is the pioneering act and for all the states in India and most of the laws in other states is similar to the Maharashtra Act.

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<sup>10</sup> See Census India, Indian Census Data, 2001, Ministry of Home Affairs, Government of India, available at: [http://censusindia.gov.in/Census\\_And\\_You/religion.aspx](http://censusindia.gov.in/Census_And_You/religion.aspx) (accessed on 21 September 2014). An aggregate of approximately 84% Indians belong to the Hindu, Sikh, Buddhist or Jain faiths.

The Acts may not use the same language (though most of them have similar language) but all of them when defining an apartment and an apartment owner define it as a property of a residential nature where the owner owns the apartment and holds a percentage share in the land and in the common areas and amenities. While the West Bengal Apartment Ownership Act, 1972 (s 2) specifically mentions the applicability of the statute to buildings used mainly for residential purposes, apartments may also be used for carrying on of any occupation, trade or business or for such other type of use as may be prescribed in the state legislation. Each of these Acts also has provision for the formation of Association of Apartment Owners who can contract in its own name and is in accordance with the existing Rules and the bye-laws. A general reading of all the Acts shows that the Association could be formed by the builder or developer or all the owners of the flat could come together and form the Association. In India there is a dualistic system which is followed and all the flat owners have equal interest in the common area and an individual ownership is not carved out for the flat owners from the common area.

### *B. Transfers of Property Interest in Apartments*

The promotion and sale of flats and apartments prior to the receipt of required approvals or even before the commencement of construction is a regular practice, but per se not considered illegal. This is referred to as the pre-launch phase or soft launch phase of the project. In this phase, apartments are sold at a far lower price than that would be expected, with the price differential between soft launch and ready-to-move (completed) being as much as 30%. This soft launch phase primarily allows the real estate developer to raise initial funds for the projects.

At present, there is a no regulation that governs the practice of soft launch save and except in the states of Maharashtra and Haryana. Maharashtra Housing (Regulation and Development) Act, 2012 and the Haryana Development and Regulation of Urban Areas Act, 1975 have made such activities illegal. The Maharashtra legislation provides that no promoter shall start any transaction including sale or marketing for sale of flats in a new project or phase of such project (s 5 (1) of the Maharashtra Housing (Regulation and Development) Act, 2012) without first registering the project with the Housing Regulatory Authority. This registration must include a copy of the chartered engineer's or chartered architect's authenticated copy of the proposed development of each phase of the project as well as proof of submission of the plan for approval from the local authority (s 4(2)(a) of the Maharashtra Housing (Regulation and Development) Act, 2012). The Maharashtra Housing (Regulation and Development) Act, 2012 also requires that the promoter retain a number of flats not exceeding 10% of the total area in each building of the project until the occupation certificate has been obtained in relation to the project (s 5(2) of the Maharashtra Housing (Regulation and Development) Act, 2012).

The Haryana legislation (s 7) provides that no person shall transfer or agree to transfer in any manner plots in a colony or make an advertisement or receive any amount in respect thereof without obtaining a license under s 3 of the Haryana Development and Regulation of Urban Areas Act, 1975. The obtaining of this license requires the real-estate developer to disclose the title to the land, extent and situation of the land, capacity to develop a colony, the layout of a colony, plan regarding the development works to be executed in the colony and conformity of the development schemes of the colony land to those of the neighbouring areas.

However in practice, promoters or real-estate developers often accept a 'booking amount' as opposed to a deposit, which allows the potential condominium buyer a contractual right to be allotted an apartment. Against this booking amount, the promoter reserves one unit out of the total inventory to be made available at a later stage. Only after the requisite licenses are obtained and the building plans have been registered is the potential condominium buyer allotted an apartment number. For example, under the Maharashtra Housing (Regulation and Development) Act, 2012, promoters may accept funds from potential apartment buyers amounting up to 20% of the sale price of the apartment before being required to enter into a formal agreement for the transfer of property (s 9 Maharashtra Housing (Regulation and Development) Act, 2012).

The risks of such soft launches are manifold<sup>11</sup>. There are chances of the projects not getting the requisite clearances, permits and licenses. While the locational preferences of the potential condominium buyer may be noted, the same may not be allotted since at the time of reservation of the property, no allotment is made. Further, due to financial issues faced by the promoter or the failure to obtain the required permits and licenses, the construction may be delayed or even cancelled. There is nothing to curb the delays in completion of projects or cancellation of the entire project when the developer fails to get the requisite approvals.

Since this aspect of apartment ownership is unregulated at present, the contractual agreement between the potential condominium buyer and the promoter provides for some protection for the property buyer in the form of an exit by way or transfer to a third party or a cancellation of the

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<sup>11</sup> Devesh Chandra Srivastava, 'Are Risks in Soft Launches worth the Low Prices?' (12 June 2012) Mumbai *Livemint*, available at: <http://www.livemint.com/Money/p9jVm9ayh9CEjEu0OQJLqL/Are-risks-in-soft-launches-worth-low-prices.html> (accessed on 21 September 2014).

reservation<sup>12</sup>. However, steep transfer fees and cancellation charges almost negate any substantial protection to property buyers.

In spite of such risks, it has been noticed that soft launches are popular and that real estate investors with high risk appetites do participate in such pre-approval stages<sup>13</sup>. As a mechanism for risk alleviation, the Maharashtra Housing (Regulation and Development) Act, 2012 provides for compensation for any person who makes an advance or a deposit on the basis of the information contained in the advertisement or prospectus and sustains any loss or damage by reason of any wilful untrue statement included therein (s 11 of the Maharashtra Housing (Regulation and Development) Act, 2012).

In cases of non-completion of the project, the Housing Regulatory Authority may, pass an appropriate order to enable completion of the construction (s 16 of the Maharashtra Housing (Regulation and Development) Act, 2012).

The Real Estate (Regulation and Development) Bill which purports to regulate this sector on a pan India basis, including issues as described above has been passed by the Indian Parliament in March 2016. Unsurprisingly, there is considerable opposition from the real estate sector. The Bill aims to benefit property buyers who are subject to the agreements made by the promoters. Specifically, under the Real Estate (Regulation and Development) Bill promoters are prohibited from issuing or publishing an advertisement or prospectus, or invite any member of the public to

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<sup>12</sup> Murari Chaturvedi, *Twenty One Years of Real Estate* (Accommodation Times, 2008), pp 65-66.

<sup>13</sup> Pritam P. Hans, 'The Real Deal' (April 2012) *Mumbai Money Today*, available at <http://businesstoday.intoday.in/story/buy-property-before-launch-good-discount-real-estate-market/1/23410.html> (accessed on 21 September 2014).

buy or book in such projects to be developed or take advances or deposits without obtaining a copy of certificate of registration with the Real Estate Regulatory Authority or without first filing a copy of such advertisement or prospectus in the office of the Authority. Non-adherence to the approved plans pursuant to which the certificate of registration is granted, or delays or cancellation of projects requires the promoter to refund the entire amount accepted, along with interest.

As mentioned earlier, the mechanism of apartment ownership is controlled through formation of co-operative societies. Section 18 of Maharashtra Housing (Regulation and Development) Act, 2012 places a responsibility on the promoter to take steps to form either a co-operative society or a company. The Promoter also has the option of submitting the property to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing and registering a declaration as laid out under the Maharashtra Apartment Ownership Act, 1970<sup>14</sup>. Under the Maharashtra Apartment Ownership Act, 1970 apartment owners hold an undivided interest in the common areas of the property in a percentage expressed in the abovementioned declaration. The difference between the Maharashtra Housing (Regulation and Development) Act, 2012 and the Maharashtra Apartment Ownership Act, 1970 is that the ownership of the common areas vests with the co-operative society and not individual members in the Maharashtra Housing (Regulation and Development) Act, 2012.

If a co-operative society or a company is formed, then in addition to the purchase of the apartment, one must apply to become a member of the co-operative society or the company and

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<sup>14</sup> Promoters may choose not to take steps to create a co-operative society or a company if it submits a declaration under Section 5 of the Maharashtra Apartment Ownership Act, 1970; See Maharashtra Housing (Regulation and Development) Act, 2014, s. 18(4).

consent to abide by the state specific co-operative society act, the co-operative society rules if any and the by-laws which govern the functioning of the co-operative society. Since, under the Co-operative Societies Act, 1912, the approval of the members of the society is also required for other transfers or transmissions of property whether through inheritance, sale, lease or license.<sup>15</sup> The by-laws of the society are registered with the Registrar of Co-operative Societies set up under the Co-operative Societies Act of the state having jurisdiction over the location of the project.

Thus, while the apartment itself is considered to be the exclusive property of the apartment owner, residents of the apartment are required to conform to the restrictions set out under the by-laws of the co-operative society. These restrictions may be onerous in nature, but cannot be contrary to the Co-operative Society Act, its subordinate rules, or the extant laws of India. Under the Transfer of Property Act, a condition or limitation absolutely restraining the transferee from parting with or disposing of his interest in the property is considered to be void.

However, specifically with regard to the example sought, certain minorities are not recognized in India as yet. Homosexuality in India is still viewed as a criminal offence<sup>16</sup>. In a recent judgment<sup>17</sup>, the Indian Supreme Court refused to declare the said provision as unconstitutional, opining that only the Indian Parliament has the authority to change laws. As on date, LGBT rights are not legally tenable and a co-operative society may consider membership of a member of the LGBT community as undesirable. Such a restriction on membership is likely to be upheld

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<sup>15</sup> *Zoroastrian Co-operative Housing Society Limited and Anr. v District Registrar Co-operative Societies (Urban) and Ors.* AIR 2005 SC 2306.

<sup>16</sup> Indian Penal Code, 1860 s. 377.

<sup>17</sup> *Suresh Kumar Koushal v NAZ Foundation* (CA 10972 OF 2013), available at: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> (accessed on 29 September 2014).



in an Indian court of law. Similar restrictions based on minority religious beliefs have also been upheld<sup>18</sup>. The jurisprudence of this mostly unfettered right of co-operative societies to restrict transfer of membership seems to originate from the concept that membership of a co-operative society constitutes a legally enforceable contract. As long as the contract does not violate the extant laws of India, such restrictions would be upheld. Further, such restriction does not amount to a 'condition or limitation absolutely restraining the transferee from parting with or disposing of his interest in the property' and therefore cannot be struck down as void.

Therefore, while the transfer of the apartment itself; whether by way of a sale or a lease cannot be absolutely restricted, the transfer of the membership of the co-operative society may be restricted.

In the absence of a co-operative society however, s 4 of Maharashtra Apartment Ownership Act, 1970 considers each apartment along with the undivided interest in the common areas and facilities as heritable and transferable immoveable property. This shows that if the registration is done under the Maharashtra Apartment Ownership Act, 1970 then the rules of transfer of immoveable property as laid down under the Transfer of Property Act, 1882 or any other law that may be in force. The provision further allows the owner to transfer the apartment and the undivided interest in the common area by way of sale, mortgage, lease, gift, exchange or any other manner. When such transfer takes place the buyer is subject to the same rights, privileges, obligations, liabilities, investigations, legal proceedings, remedies, penalty, forfeiture and punishment and to the same extent as the seller was.

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<sup>18</sup> In *Zoroastrian Co-operative Housing Society Ltd.* (note 15 above) the Indian Supreme Court upheld the right of a co-operative society to restrict its members only to a certain religious sect.

### *C. Common Property, Limited Common Property and Apartments*

Under Maharashtra law, s 3(a) of the Maharashtra Apartment Ownership Act, 1970 defines an apartment as that part of the property intended to be used individually, having enclosed spaces located in different floors or in parts of the building. Section 3(f) defines ‘common areas and facilities’ means ‘the land on which the building is located; the foundations, columns, girders, beams, supports, main walls, roofs, halls corridors, lobbies, stairs, stair-ways, fire escapes and entrances and exits of the building; the basements, cellars, yards, gardens, parking areas and storage spaces; the premises for the lodging of janitors or persons employed for the management of the property; installation of central services, such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating; the elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use; such community and commercial facilities as may be provided for in the Declaration and all other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use’.

However, the Maharashtra Housing (Regulation and Development) Act, 2012 makes a distinction between ‘common areas and facilities’ and ‘limited common areas and facilities’. The definition of ‘common areas and facilities’ is restricted to ‘the areas, amenities and facilities intended for common use of apartment owners in a layout and includes park, recreational ground, playground, open space, path, pathway, alleyway or garden located outside the area of any building or buildings, street lights, securities, water and electric supply, sewerage, drainage,

public works, firefighting systems and works, water tanks, other utilities and services, and the like, provided or to be provided by the promoter within the layout but shall not include parking spaces or garages (s 2(e) of the Maharashtra Housing (Regulation and Development) Act, 2012). The definition of 'limited common areas and facilities of a building' refers to 'entrance hall, staircases, lift, common passages on every floor, firefighting systems within building including fire chute, refuge areas, garbage disposal area including garbage chute, service floors or terraces above the upper most floor of the building and includes all areas in the building except parking spaces and utility areas'. The Maharashtra Housing (Regulation and Development) Act, 2012 makes this distinction on the basis that there are areas common to an apartment complex having multiple buildings and areas common to a building which is shared by the residents of the building.

Section 9 of the Maharashtra Housing (Regulation and Development) Act, 2012, states that the promoter is required to enter into an agreement with the buyer before accepting any advance payment. The section further provides that the agreement should clearly indicate and provide particulars of the 'nature, extent and description of limited common areas and facilities' and 'percentage of undivided interest in the common areas and facilities' among other particulars and descriptions. Thus, under Maharashtra law, the parts of land and building which fall under the category of common areas and facilities as well as apartment owners' interest in them is negotiated and does not have a regulatory basis of computation.

Each state has a town planning legislation which provides for a floor space index for all constructions under its jurisdiction. For example, the state of Maharashtra has passed the

Maharashtra Regional and Town Planning Act, 1966. Such town planning legislations provide for the notification of a floor space index which is computed by dividing the total area of all floors of a building, by the plot size. As on the date of this paper, the floor space index for Mumbai is 2.5. This means that the aggregate of the total area of all the floors of a building in Mumbai must not be in excess of 2.5 times the area of the plot on which the building is situated. It may be inferred that the remaining area of the plot, if any, may be used for common areas. The floor space index is altered from time to time and is different for different states.

The Delhi Apartment Ownership Act, 1986 states that the undivided interest of the owner of apartment in the common area is to be computed as mentioned in the Deed of Apartment and as a percentage of the value of the apartment in relation to the value of the property. The West Bengal Apartment Ownership Act, 1972 on the other hand states that the percentage in which the apartment owners are entitled to the undivided interest in the common property is expressed in the Declaration. Hence, the West Bengal Apartment Ownership Act, 1972 leaves the basis of calculation at the discretion of the apartment association. Though, both the Delhi Apartment Ownership Act, 1986 and the West Bengal Apartment Ownership Act, 1972 state that such percentage once decided and registered cannot be altered without the consent of all apartment owners.

Limited common areas and facilities are such areas and facilities as mentioned in the Declaration which is reserved for the use of certain apartment or apartments to the exclusion of other apartments. While provisions have been made for the maximum area of the floors of a building,

the legislations are silent on how the determination regarding limited common areas and facilities is made.

Depending upon the manner in which parking spaces are transferred, they may fall within the ambit of common areas of the apartments, or may be transferred either on a standalone basis or as inclusive of an apartment. For example, the Maharashtra Housing (Regulation and Development) Act, 2012 explicitly provides that parking spaces and garages do not fall within the ambit of common areas (s 2 (e)). On the other hand, the Tamil Nadu Apartment Ownership Act, 1994 includes parking spaces within common areas (s 3(h)). Provisions similar to the Tamil Nadu legislations also exist in the West Bengal Apartment Ownership Act, 1972 (s 3(d)(3)) and the Delhi Apartment Ownership Act, 1986 (s 3(j)(iii)).

The manner in which parking areas are structured and transferred would further depend upon individual promoters and would be set out in the by-laws of the housing association, in the declaration or in the agreement of sale.

In practice, however, parking spaces are allotted to the apartment owner on the proportionate basis of the area of the house. An apartment owner may also choose to purchase more than one parking space, depending upon the owners requirements. The parking spaces are considered to be attached to the apartment sold or the commercial unit, having no separate existence of their own. Hence, the parking spaces cannot be sold individually to an outsider. A predetermined area for parking the vehicle is sold along with the apartment or the commercial unit as the case may be, and if additional vehicle parking space is required then the apartment owner would be

required to pay additional charges for the same, and subject to the discretion of the promoter. The parking spaces allotted to the apartment owner or the commercial unit is not considered to be a part of the common area.

Section 3(f) of the Maharashtra Apartment Ownership Act, 1970 as stated earlier defines 'common areas and facilities'. The definition includes the word 'means' which makes it an exhaustive definition. The provision allows the apartment association to include other spaces, areas or other parts of the building as a common area.

Section 3(g) of the said Maharashtra Apartment Ownership Act, 1970 provides a definition of common expenses where s 3(g)(2) states that it includes 'expenses of administration, maintenance, repair or replacement of the common areas and facilities; expenses agreed upon as common expenses by Association of Apartment Owners and expenses declared as common expenses by the provisions of this Act or by the Declaration or by-laws.'

If the 'outside window' forms part of the building as a common area, then the onus of repair of the window would on be the building management or apartment association. However, if the 'outside window' forms part of the wall enclosing an apartment, the repair of the same would be the responsibility of the apartment owner.

The Act, further in s 10 states how the common profits and expenses are to be shared between the apartment owners. The provision states that the expenses are to be charged to the apartment owners is on a proportionate basis that is in accordance 'to the percentage of the undivided

interest in the common areas and facilities '. This liability of common expense is to be borne by the apartment owner irrespective of whether the apartment owner use the common facility or not and even after he/she has abandoned the apartment.

Section 18 of the Tamil Nadu Apartment Ownership Act, 1994 specifically provides that The Society or the Association of Apartment owners shall an irrevocable right to be exercised by its secretary or by any other person authorized in this behalf by the committee to have access to every apartment from time to time during reasonable hours as may be necessary for the maintenance, repairs and replacement of any of the common areas and facilities and the limited common areas and facilities therein or accessible from such apartment, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities and the limited common areas and facilities or to another apartment or apartments.

Unit entitlements refers to the share of each apartment owner in common property like grounds, parkade, hallways etc. and common facilities like guest suite, exercise room, bike storage and other assets of a development.

The Maharashtra Housing (Regulation and Development) Act, 2012 allows promoters to sell the flats to buyers on terms and conditions, but these terms and conditions are to be recorded by them and the buyer is to be made aware of the same before such sale takes place. They also need to state in writing the precise nature of the organization of the persons to be constituted and terms and conditions of governing such organizations of persons. Section 9 of the Maharashtra Housing (Regulation and Development) Act, 2012 clearly states that before the Promoter sells

that flats on an ownership basis, he needs to enter into a written agreement for sale with each of such persons and the same is to be registered under the Registration Act, 1908. Section 9(2) of the Maharashtra Housing (Regulation and Development) Act, 2012 lays down the particulars that are to be mentioned in the agreement for sale including the 'proportionate price of the limited common areas and facilities and parking spaces (to be shown separately) to be paid by the purchaser', 'the nature, extent and description of limited common areas and facilities of a building' as well as the 'percentage of undivided interests in the limited common areas and facilities of the building, pertaining to the flat agreed to be sold'.

Even though Maharashtra Housing (Regulation and Development) Act, 2012 provides for an undivided interest in common areas, it is silent as to how the undivided interest is to be determined for each apartment owner. Since, the agreements entered into between the promoter and the purchaser contain the particular it is left to the promoter to determine how the undivided interest in the common property is to be determined.

Under the Co-operative Societies Act, 1912 each member of the society gets one vote in the conduct of the affairs of the society if the society is not limited by shares irrespective of the number of units owned by the member. If the society is limited by shares then each member gets that many votes as may be prescribed in the by-laws.

Neither the Maharashtra Housing (Regulation and Development) Act, 2012 nor the Maharashtra Apartment Ownership Act, 1970 prohibit the residents of the building from keeping pets, conducting a profession in their flats or from composing music in their apartment. The bye-laws



of each Association deal with such matters. Residents are generally allowed to keep pets as long as they are not creating nuisance for other flat owners. Each bye-law has a separate way of dealing with pets, carrying out of profession and making of music. There have been decisions by consumer courts ordering the Association to pay compensation to the pet owner for having caused inconvenience to him by not letting the pet dog use the building lift.<sup>19</sup>

Apartment associations generally would not allow carrying out of commercial activities in the residential flats as this may cause nuisance and disturbance to other flat owners, preventing them from enjoying their property. However, residents are allowed to carry on professional activities including the practice of medicine, chartered accounting or law. Commercial activities are generally such activities which involve purchase and sale of goods. Business such as profession, service and teaching are not considered as commercial activities and generally allowed by the association as long as the other residents are not disturbed. In the case of *Phillipos & Company and Ors. v. The State*<sup>20</sup> it was held that having a firm of chartered accountant in an apartment is not a commercial activity and the judge observed: ‘A profession is a vocation or occupation requiring special usually advanced education and skill. The work and skill involved in a profession is predominantly mental or intellectual rather than physical or manual.’<sup>21</sup> In *V. Sasidharan v. Peter and Karunakar*<sup>22</sup> the Supreme Court held that the office of a lawyer or a firm of a lawyer will not be considered a commercial establishment. In *Dr. Devendra M. Surbhi v. State of Gujarat*<sup>23</sup> the Supreme Court rules that a private dispensary of a medical practitioner

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<sup>19</sup> N. Ganesh, ‘Peter pan can use apartment lift now’ (17 December 2008) Mumbai *The Indian Express*, available at: <http://archive.indianexpress.com/news/peter-pan-can-use-apartment-lift-now/399463/> (accessed on 11 October 2014).

<sup>20</sup> *Phillipos & Company and Ors. v The State* 1990 67 CompCas 154 Kar.

<sup>21</sup> *Ibid*, para 30.

<sup>22</sup> *V. Sasidharan v Peter and Karunakar* (1985) 65 FJR 374 (SC).

<sup>23</sup> *Dr. Deevendra M. Surbhi v State of Gujarat* AIR 1969 SC 63 6T.

did not come within the definition of Commercial Establishment under the Bombay Shops and Establishments Act, 1948.

Similarly composing or playing music in apartments is allowed by the association generally as long as other residents are not nuisanced.

#### *D. Apartment Owners' Rights and Obligations*

The Acts do not lay down with elaborate details as to the sanctions to be imposed on the apartment owners. Section 7 of the Maharashtra Apartment Ownership Act, 1970 sets out that each apartment owner shall comply with the by-laws, the administrative rules and regulations, covenants, conditions and restrictions set forth in the Declaration or in the Deed to his/her apartment. Not following the rules and regulations shall be 'grounds for action to recover the sums due, for damages or injunctive relief or both maintainable by the Manager or Board of Managers on behalf of the Association of Apartment Owners or, in a proper case, by an aggrieved apartment owner.'

The Apex Body or Federation formed in an apartment complex is required to manage and administer the common areas and the facilities without having any legal rights, title and interest in the building or buildings in such a layout plot; all legal rights, title and interest in the building or buildings shall belong to the respective entities in whose favour the conveyance of such building or buildings is executed (ss 9(9) and 18(3)). It may be therefore inferred that the

members or apartment residents, as owners of the common areas and facilities would also be liable for payment of maintenance charges as may be levied by the Apex Body or Federation.

In terms of financial obligations, common expenses towards the operations and maintenance of the property shall be charged to apartment owners according to the percentage of the undivided interest in the common areas and facilities (s 10 of the Maharashtra Apartment Ownership Act, 1970). This liability for contributing to the common expenses cannot be waived (s 17). Such common expenses which are assessed by the apartment owners association but unpaid by the owners would constitute a charge on the apartment itself (s 19). In other words, the apartment is considered as a security for the recovery of such unpaid common expenses (s 100 of the Transfer of Property Act, 1882). Accordingly, while there is no transfer of property interest, the apartment owners association is given a right to receive payment out of the sale proceeds of the apartment (s 20 of the Maharashtra Apartment Ownership Act, 1970). Additionally, the apartment owners association would have a cause of action before a court of law to recover the sums due.

In terms of social obligations, the Maharashtra Apartment Ownership Act, 1970 prohibits certain work that can be done by the apartment owners, including any work which would jeopardize the soundness or safety of the property, reduce the value of the property or impair any easement or hereditament. Apartment owners are also prohibited from adding any material structure or excavate any additional basement or cellar. However, such activities are permissible with the unanimous consent of all the other apartment owners (s 8). Failure to adhere to these obligations would give rise to a cause of action for damages and injunctive relief.

Additionally, in case of nuisance, apartment owners would also be liable under Indian tort law. Aggrieved parties may seek damages and injunctive relief against the apartment owner causing the nuisance.

#### *E. Apartment Complex Governance*

Apartment complexes may be registered under the Maharashtra Housing (Regulation and Development) Act, 2012 either as a private limited company or a co-operative society (s 18). As a private limited company, by-laws in the form of an Articles of Association must be drafted and entered into by and between the members of the company. In the event of a co-operative society established, members must enter into by-laws for their society. These by-laws are applicable in addition to the rules set down in the Maharashtra Co-operative Societies Act, 1960.

Members may also optionally register their apartment complex under the Maharashtra Apartment Ownership Act, 1970 by executing a Declaration as an association of apartment owners (s 18(4) of the Maharashtra Housing (Regulation and Development) Act, 2012. As an association of apartment owners, the Maharashtra Apartment Ownership Act, 1970 requires by-laws of the association also be entered into. These by-laws provide for the governance of the association in addition to the provisions of the Maharashtra Apartment Ownership Act, 1970.

As statutory documents being entered into by and between the members of the apartment complex, these by-laws are considered to be laws for the respective associations or co-operative society and are binding on all signatories *viz.* members (s 24 of the Maharashtra Apartment

Ownership Act, 1970). These by-laws are to be followed by the members in addition to the statutory rights and obligations.

While none of the three statutes refer to a model by-law which the society or the association needs to follow, the statutes themselves make reference to the contents to be included in the by-laws (ss 16 (2) and (3) of the Maharashtra Apartment Ownership Act, 1970). These include

- Rules as to the composition of the Board of Managers, including
  - o Number of persons on the Board,
  - o Rotation of members,
  - o Powers and duties of the Board,
  - o Compensation if any to be paid to the members for their services and procedure for removal of the members;
- The procedure for calling of meeting of the Board and the quorum;
- The election for the office bearers of the Association including
  - o the President for the Board and
  - o the Association of Apartment Owners,
  - o Secretary for recording the minutes of the meeting and
  - o Treasurer for maintaining and keeping the book of accounts;
- Maintenance, repair and replacement of the common areas and facilities, payments for such expenses and manner of collection from the various owners for such expenses, designation and removal of people for carrying out such maintenance, repair and replacement;

- Method of adopting and amending the administrative rules for the use of common areas and facilities, rules and restrictions for the use of the common areas and facilities so as to not unreasonably disturb the enjoyment of others;
- The percentage of vote required for amending the by-laws if required;
- Rules regarding transfer and/or partition of apartments and/or common facilities, leasing out certain common areas for commercial purposes and the proceeds of which are to be divided among the apartment owners; and
- A declaration that the rules set out in the by-laws are not violative of the provisions of the Maharashtra Apartment Ownership Act, 1970.

The by-laws of each co-operative society or the apartment association are to be registered with the Registrar of the co-operative society as appointed by the State under the Maharashtra Co-operative Societies Act, 1960 (s 2(i)(2) of the Maharashtra Apartment Ownership Act, 1970 and s 9 of the Maharashtra Co-operative Societies Act, 1960).

The by-laws (including the amendments to the by-laws) of the association are binding on all the apartment owners, the tenants, the employees of the apartment owners and any such person who uses the property which is to be governed by the by-laws (s 24 of the Maharashtra Apartment Ownership Act, 1970). Upon a change of ownership, the purchasers of the apartment must also enter their names into a register of members maintained for the purpose of the association of apartment owners. By doing so, such purchasers bind themselves to the by-laws of the apartment complex.

The law is silent as to whether by-laws bind the visitors to such apartments or not. However, it could be argued that the apartment owners could be vicariously held liable for the actions of their respective visitors.

The by-laws of the apartment association may be amended as and when the amendment is approved by the members of the apartment complex. The by-laws of the society can be amended in a general meeting of the society held for this purpose by a vote of two-thirds of its members - a requisite quorum which must be specified in the by-laws itself (s 12 of the Maharashtra Co-operative Societies Act, 1960). The amendments to the by-laws must also be registered with the Sub-Registrar of Assurances having jurisdiction over the place where the apartment complex is located. The by-laws govern the working of the co-operative society or the apartment owners association. In the event of a conflict between the by-laws and extant statutes, the statutory provisions take precedence over the by-laws.

The Maharashtra Housing (Regulation and Development) Act, 2012 and Maharashtra Apartment Ownership Act, 1970 are silent as to whether the co-operative society or the apartment association are juristic personalities, capable of being subject to legal proceedings and ownership of property. However, under s 7 of the Maharashtra Apartment Ownership Act, 1970, the Manager of an apartment complex or the Board of Managers may, on behalf of the apartment owners association, institute and maintain a suit for damages or injunctive relief arising out of a violation of by-laws and administrative rules and regulations thereof, against any member. Section 7 may provide some indirect indication that the apartment owners association may indeed have a legal personality separate from its members.

Further, s 36 of the Maharashtra Co-operative Societies Act, 1960 provides that a co-operative society, once registered, becomes a body corporate with perpetual succession, common seal, having the power to acquire and dispose property, to enter into contracts and to institute and defend suits among other things. Further, both co-operative societies and apartment associations, as association of persons, whether incorporated or not, are considered to be separate legal entities for tax purposes under s 2(31) of the Income Tax Act, 1961. It must be noted however, that for the purposes of tax on lands and buildings, each apartment is considered to be a separate unit (ss 18 of the Maharashtra Apartment Ownership Act, 1970, 14 of the West Bengal Apartment Ownership Act, 1972, 21 of the Tamil Nadu Apartment Ownership Act, 1994 and 22 of the Delhi Apartment Ownership Act, 1986).

Section 18(1) of the Maharashtra Housing (Regulation and Development) Act, 2012 requires that the promoter set up a co-operative society or a company or a 'legal entity of persons'. Further, the company formed under the Maharashtra Housing (Regulation and Development) Act, 2012 is a s 8 company under the Indian Companies Act, 2013. The Companies Act, 2013, in consonance with globally accepted principles of corporate personality, deems companies to have a legal personality separate from its members (s 11 of the Companies Act, 2013). These s 8 companies have limited liability, perpetual succession and the profits if any earned by the company cannot be distributed as dividends to its members, but have to be used for promoting the object for which the company was established (ss 8(1)(b) and 8(1)(c) of the Companies Act, 1956).



The daily management of the condominium is entrusted with the Management or the Board of Managers or Management Committee of each company or association or co-operative society as may be formed for the condominium. The Management Committee consists of the President, the Vice President, the Secretary and the Treasurer (generally called the Executive Committee, but not necessary) and some additional number of members as decided by the by-laws. The procedure for selection of the management or the Board of Managers is subjective to each condominium and is laid down in their by-laws<sup>24</sup>. In case of apartment associations all the apartment owners in that condominium become a member of the association after payment of a nominal fee. The members of the association elect the office bearers by a majority vote. These office bearers assist in carrying out the day to day activities of the association.

In the event of a formation of a company, as opposed to the formation of a co-operative society or an association of apartment owners, the day-to-day management of the apartment complex is carried out by the Board of Directors appointed by the members of the company/ apartment complex.

The administration of apartment complexes is governed by the bye-laws of the association of residents (s 16(1) of the Maharashtra Apartment Ownership Act, 1970). These bye-laws also provide for administration of annual and special general meetings (s 16(3) of the Maharashtra Apartment Ownership Act, 1970) and the method of calling meetings of the apartment owners; what percentage, if other than a majority of apartment owners, shall constitute a quorum (s 16(2)(b) of the Maharashtra Apartment Ownership Act, 1970).

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<sup>24</sup> For a sample set of by-laws, please refer to <http://delhi.gov.in/wps/wcm/connect/1f457700415e73b58678f7bb6b86b1ea/ModelByLawsCGHS.PDF?MOD=AJPERES&lmod=-283899749&CACHEID=1f457700415e73b58678f7bb6b86b1ea> (accessed on 9 November 2014).

The Board of Managers for the apartment association is generally elected in the first Annual General Meeting (AGM) which is held after the formation of the association. The three kind of meetings that the by-laws typically have provisions for are Annual Meetings, Special General Meetings and Adjourned Meetings.

The office bearers of the Board of Managers serve for a year and at each AGM, fresh elections for the posts of office bearers take place. Further, matters such as the appointment of auditors for the association, budget of the association, annual reports etc. are considered in addition to any other matters that may have been notified earlier. A Special General Meeting for the association may be called by the Secretary of the association after receiving a petition from a minimum number of association members (as set out in the by-laws) within a prescribed number of days (as set out in the by-laws). At a Special General Meeting, only those matters set out in the petition and notified to the association members are discussed.

Adjourned Meetings are those meetings when the quorum is generally not met and the meeting is adjourned for a few hours (as laid down in the by-laws). Later when the members meet, the numbers of members present for the meeting forms the quorum.

Neither the Maharashtra Apartment Ownership Act, 1970 nor the Maharashtra Housing (Regulation and Development) Act, 2012 lay down any regulation with regards the management structure. However, with increasing complexity in the administration of apartment complexes,

the by-laws of most modern day residential condominiums do provide for a multi-level management structure.

Each building association or a multi-building complex as the case may be, has its own way of dealing with management. Modern apartment complexes usually have two-tier management structures in order to make ease the management of the apartment complex. Each Management Committee consists of three primary office bearers – that of the President, the Secretary and the Treasurer. The other members to the Management Committee are elected by the other residents. Each of the remaining members is then allotted a portfolio to administer, such as sports and recreational facilities, maintenance of common areas, arranging for cultural activities and events etc. Each member of the Board may then be assisted in their portfolio responsibilities by other residents, either as members of a sub-committee, or in an informal capacity.

Increasingly, there have been instances of multi-use complexes, which not only house residential areas, but also facilities for requirements associated with residences, including retail commercial complexes, hospitals and schools. In such cases, the entire colony or the complex would be managed and administered by an Apex Committee which consists of representatives from each of the aspects of the complex, viz., the residential buildings, hospital, commercial complex or school as the case may be. The Apex Committee is charged with the duty of managing the areas which are common to all and the cost is proportioned according to the unit sizes of each body. The administration of the Apartment Association is with the General Body consisting of all the members/ apartment owners. The General Body does not interfere with the power of the

Executive Committee consisting primarily of the President, Secretary and Treasurer. The power of the Executive Committee is provided for in the bye-laws.

*F. Termination of an Apartment Association*

While the apartment ownership or transfer laws do not provide for the administration or termination of an apartment complex- municipal corporations, particularly in large, metropolitan cities may refer to the provisions of the National Building Code of India, 2005, in case of buildings (not necessarily residential) which pose a hazard to life and health. The National Building Code of India, 2005 defines 'unsafe buildings' as - buildings which are structurally and constructionally unsafe or insanitary or not provided with adequate means of egress or which constitute a fire hazard or are otherwise dangerous to human life or which in relation to existing use constitute a hazard to safety or health or public welfare, by reason of inadequate maintenance, dilapidation or abandonment (para 2.29). The municipal corporation may direct in writing that an unsafe building shall be vacated immediately or within the period specified in the directions. If any person does not comply with the orders of vacating a building, the Authority may direct law enforcement officials to remove the person from the building (para 15.1.3). The municipal corporation may further order for the repair or demolition of the building in the event it poses an imminent danger to human life or health (paras 15.4 and 15.5).

The Maharashtra Apartment Ownership Act, 1970 provides for certain rights available to members/ apartment owners in the event of significant damage or destruction of the construction (s 22). In the event that the members determine that the construction is not to be re-built or

repaired, the property shall be deemed to be owned in common by the apartment owners and the undivided interest in the property shall be divided in the same proportion as of the undivided interest previously owned by such owner in the common areas and facilities. Any encumbrances affecting any of the apartments shall be transferred in accordance with the existing priority to the percentage of the undivided interest of the apartment owner. Further, the property shall be subject to an action for partition at the suit of any apartment owner.

Upon the destruction of the building, the apartment association is dissolved and de-registered.

#### *G. Dispute Resolution*

The by-laws of the apartment association usually provide for a dispute resolution clause whereby disputes that arise between two apartment owners or between apartment owner and the association is resolved by the association, without recourse to a court or law in the first instance. As an independent legal entity, the apartment association has the right to initiate legal proceedings on behalf of the flat owners and may be subject to legal proceedings as well.

In the event of complaints or claims against the real estate developer, the promoter may be held liable under s 49 of the Maharashtra Housing (Regulation and Development) Act, 2012. Penalties for non-compliance with Maharashtra Housing (Regulation and Development) Act, 2012 or criminal breach of trust attract penal liability leading to imprisonment and/or a fine.

Further, the construction of a building is considered to be a works contract provided that the sale of apartments takes place before the completion of the construction<sup>25</sup>. A deficiency in the performance of a works contract gives rise to a claim under the Consumer Protection Act, 1986 (s 12). A similar claim may also be made by individual members against the association for deficiency in services. However, it has been noted that the recourse under the Consumer Protection Act, 1986 is only curative and is inadequate to address all the concerns of buyers and promoters in the sector<sup>26</sup>.

### **III. Recent Developments**

#### *A. DLF v. Belaire*

Over the past few decades, the demand for housing in India has increased manifold. Taking advantage of the situation, the private players have taken over the real estate sector with no concern for the consumers<sup>27</sup>. Consequently the consumers are unable to procure complete information or enforce accountability against builders and developers in the absence of an effective mechanism in place. The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated. There is, thus, absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is inadequate to address all the concerns of buyers and promoters in

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<sup>25</sup> *Larsen & Toubro Ltd. v State of Karnataka* (2014) 1 SCC 708.

<sup>26</sup> 30<sup>th</sup> Report of the Standing Committee on Urban Development, Ministry of Housing and Urban Poverty Alleviation, Government of India, February 2014, p 8.

<sup>27</sup> *Ibid.*

that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums<sup>28</sup>.

This need for regulating the burgeoning real estate sector came into sharp focus in the matter of DLF Limited v. Belaire Owners Association. DLF Limited (DLF) announced the launch of a Group Housing Complex, known as 'The Belaire' to be constructed in Gurgaon, Haryana. In the period from August 2006 to November 2006, customers had reserved an apartment by paying the initial amount of INR 2,000,000 and the apartment buyer's agreement was signed months after the payment of initial amount, by which time, a further substantial amount had been paid.

As per the advertisements on which the customers had relied, the complex was to constitute of five multi-storied buildings of 19 floors each and the number of apartments to be built therein was to be 368. However, in the place of 19 floors with 368 apartments, 29 floors were constructed. This resulted in the contraction of areas and facilities earmarked for initial allottees and caused abnormal delay in the completion of the project which initially was to be completed within three years from the date of execution of the apartment buyer's agreement. Such changes in the plans were made without informing the initial allottees and caused serious adverse effects and ramifications on their rights.

Upon becoming aware of such developments, the apartment allottees of 'The Belaire' formed the Belaire Owner's Association (hereinafter the Informant) and filed a complaint in the Competition

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<sup>28</sup> *Ibid.*

Commission of India under s 19 (1)(a)<sup>29</sup> of the Competition Act, 2002 on 5 May 2010. The Informant alleged that by imposing highly arbitrary, unfair and unreasonable conditions on the customers, DLF had abused its dominant position as prescribed under s 4(2)(a)<sup>30</sup> of the Competition Act, 2002 in the so called relevant market of ‘high end’ residential accommodation in Gurgaon. Detailed submissions were made by the Informant while filing the complaint and included all the arbitrary, unfair and unreasonable clauses of the agreement and the practises of DLF.

DLF had contended that they were not in a dominant position as there were many other large real estate companies and builders in India, and hence the customers had a wide choice while searching an apartment<sup>31</sup>. It pointed out that a number of competitors exist in the market and there is stiff competition. It explained its high turnover with the fact that it has presence in other markets also. It was also contended that the conditions included in the agreement are the ‘usual practices’ adopted by the builders and are part of industry practice. Also the agreement was signed by the allottees after considering all pros and cons. The market share of DLF in the relevant market was ascertained on the basis of the report from Centre for Monitoring Indian Economy (CMIE) for the month of April 2010. The report stated that DLF along with its subsidiaries has the highest market share in India among all the listed companies engaged in

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<sup>29</sup> The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association.

<sup>30</sup> There shall be an abuse of dominant position, if an enterprise or a group directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or service; or price in purchase or sale (including predatory price) of goods or service.

<sup>31</sup> *Belaire Owner's Association v DLF Limited and Ors.* 2011 CompLR 0239 (CCI), p 52.



housing construction during the year 2007-08 and 2008-09 with 40.46% and 32.65% respectively<sup>32</sup>.

In the present case, the Director General had examined the allegations of the Informant, and concluded that with respect to the commencement of the project without sanction/approval from Department of Town and Country Planning, delay in completion of the project coupled with the unilateral violation of the agreement when decision was taken to increase the number of floors mid-way (from 19 to 29) which led to the issue of floor area ratio and density per acre, all amounted to abuse of dominant position. DLF denied charges of abuse and stated that there was no violation of any law if projects were launched before building plans were submitted to the concerned authorities. DLF also claimed that when agreements were entered into between parties consensually they are binding on both parties and so the issue of abuse of dominance does not arise. The following are the sixteen clauses in the Buyers Agreement which were considered to unfair by the Commission:

1. Unilateral changes in the agreement and the power to supersede and substitute the terms of the agreement with respect to subsequently approved layout plans without the consent of the apartment allottees;
2. DLF's right to change to layout plan, again without the consent of the apartment allottees;
3. Discretion of DLF to use areas owned by the allottees in the compound for other purposes such as residential, commercial;

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<sup>32</sup> DG Report on *Belair Owner's Association* (note 31 above).

4. It was mandatory to pay a preferential location charged paid up-front, but when the location was unavailable, the refund would adjusted with the last instalment of payment (without any interest);
5. Unilateral right of DLF to increase and decrease the super area with consent of allottees who were required to bear the price of this right, by being coerced to make additional payments as and when necessary;
6. DLF has the right to substitute the method of calculating the proportionate share in ownership of the land beneath the building and/ common area and facilities;
7. Allottees have no rights in regard to the community recreational facilities;
8. The current project underway ('The Belaire') may be linked to another at the sole discretion of DLF which would alter the ambience and quality of living;
9. DLF made it mandatory for the allottee to pay any extra external charges that would arise during the construction;
10. Arrangement of the supply of power to the apartments and their rates are subject to the consent of DLF and can be levied as and when desired;
11. Arbitrary forfeiture of amounts paid by the allottee as earnest money, brokerage charges etc;
12. No exit option for the allottees, in case possession is not handed over and even in that event the money is refunded without interest after the apartment has been sold to someone else. DLF had minimized any loss possible for itself but had maximized losses for the allottee in every situation;
13. DLF may abandon the project without any penalty. In case possession is not handed over within three years of the agreement, DLF is liable only to refund the amount paid by the apartment allottee with a simple interest at nine percent per annum for the period such

amount was lying with DLF. If the project is delayed beyond three years, compensation will be paid at a mere five percent.

14. Allottees have no rights relating to alterations of the building;
15. Third party rights created to raise finance/loan, which is to the detriment of the allottees without their consent;
16. Penalty in case of default of payment for the allottees is at a rate of 15% for the first 90 days after which it would increase to 18% per annum.

With all these contentions in mind, the Competition Commission of India held that DLF was abusing its dominant position owing to several unfair and onerous conditions allowing DLF to make unilateral changes in the construction and absolute discretion to change clauses without consent of allottees<sup>33</sup>. The allottees on one hand had no reasonable exit option and on the other had no authority with regard to the building plans. All powers, authority and control vested with DLF.

The Commission taking into account all the instances of abuse imposed a penalty on DLF at the rate of seven percent of the average turnover for the last three preceding financial years, amounting to approximately INR 6.3 billion<sup>34</sup>. This decree was upheld by the Competition Commission Appellate Tribunal<sup>35</sup> as well as the Supreme Court of India<sup>36</sup>.

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<sup>33</sup> Shoaib, 'The Penalty on DLF by CCI will effect the real estate sector' (24 August 2011) Good Returns, available at: <http://www.goodreturns.in/news/2011/08/24/cci-order-against-dlf-impact-realty-sector.html> (accessed on 8 November 2014).

<sup>34</sup> DG Report, (note 32 above), pp 236-237.

<sup>35</sup> *DLF Limited v Competition Commission of India*, Competition Appellate Tribunal, Appeal No. 20 of 2011 2014 CompLR 1 (CompAT), available at [http://compat.nic.in/upload/PDFs/mayordersApp2014/19\\_05\\_14.pdf](http://compat.nic.in/upload/PDFs/mayordersApp2014/19_05_14.pdf) (accessed on 10 November 2014).

<sup>36</sup> *DLF Limited v Competition Commission of India*, Interim Application (for stay) No. 1 of 2014 in Civil Appeal No. 6328 of 2014, order dated 27 August 2014, available at:

## *B. The Real Estate (Regulation and Development) Bill, 2013*

One direct result of the *DLF v. Belaire* case was the promulgation of the draft Real Estate Regulation and Development Bill in 2011. It was presented to the Indian Parliament by the then Union Minister for Housing and Urban Poverty Alleviation, Kumari Selja and was made open for public consultation. The Real Estate (Regulation and Development) Bill, 2013 was cleared by the Union Cabinet on 4 June 2013 after certain amendments. It was introduced in the Rajya Sabha on 14 August 2013 by the Ministry of Housing and Poverty Alleviation.

The Real Estate (Regulation and Development) Bill, 2013 is essentially a more stringent version of the Maharashtra Housing (Regulation and Development) Act, 2014. The salient features of the Real Estate (Regulation and Development) Bill, 2013 include the establishment of Real Estate Regulatory Authority in each state (cl 18). Real Estate Regulatory Authorities are government agencies charged with the responsibility of regulating real estate development activities and to maintain transparency in the sector. It is further responsible for keeping a record of development activities by conducting inquiries and directing the roles of promoters, allottees and real estate agents. The Real Estate Regulatory Authority, along with the Central Advisory Council is also expected to advise the government on policy matters governing the real estate sector (cl 35). Real Estate Regulatory Authorities may issue directions for the implementation (cl 32) or impose penalties and fines for the non-compliance of the provisions of the Bill (cl 33). An appeal against

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<http://courtnic.nic.in/supremecourt/temp/ac%20632814p.txt> (accessed on 10 November 2014); *See also DLF Limited v Competition Commission of India* 2014 (10) SCALE 417.

an order of a Real Estate Regulatory Authority lies to the Real Estate Regulatory Tribunal (cl 37).

Residential real estate development projects will be required to register themselves with the Real Estate Regulatory Authority having jurisdiction over the location where the project is to be constructed (cl 3). Upon registration, details of the project, including the site and layout plan, and schedule for completion of the real estate project must be provided to the Real Estate Regulatory Authority for further dissemination to the public (cl 11). The promoter, upon entering into an agreement of sale with the allottee shall be responsible to make available to the allottee, the following information, namely, the site and layout plans along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority, and the stage-wise time schedule of completion of the project, including the provisions for water, sanitation and electricity (cl 11). Promoters are further prohibited from accepting more than ten percent of the of the cost of the apartment, plot, or building, as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person (cl 13). The promoter is further charged with the duty to repair and rectify any structural defects in the construction within a period of two years from the date on which the allottee was granted possession (cl 14). Finally, title to the land underlying the construction shall be conveyed to the allottees in undivided proportions (cl 15).

This Bill will ensure greater accountability towards consumers, and significantly reduce frauds, arrest delays and the current high transaction costs. It attempts to balance the interests of

consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast track dispute resolution mechanism<sup>37</sup>. While the Real Estate (Regulation and Development) Bill, 2013 has been widely met with approval<sup>38</sup>, there remains considerable resistance from the real estate industry itself and quite understandably so<sup>39</sup>. Further discussions on the Bill took place in the Indian Parliament<sup>40</sup> and the Bill was finally enacted on the 10<sup>th</sup> of March 2016<sup>41</sup>.

#### IV. Conclusion

Post-independence India, being a primarily agrarian country and with a strong emphasis on Gandhian principles of village governance, gave little attention to what was essentially an urban concern – that of condominium legislation. With rising industrialisation in the 1960s and 70s, migration of workers to urban areas gave rise to a need to regulate the housing industry in such urban areas. However, considering the marginally pro-socialist outlook that India had at the time,

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<sup>37</sup> 30<sup>th</sup> Report of the Standing Committee on Urban Development (note 26 above), p 9.

<sup>38</sup> 'Real Estate Regulation Bill to draw fair industry practices, accountability' (19 September 2013) Bangalore *Business Standard*, available at: [http://www.business-standard.com/article/economy-policy/real-estate-regulation-bill-to-draw-fair-industry-practices-accountability-113091901135\\_1.html](http://www.business-standard.com/article/economy-policy/real-estate-regulation-bill-to-draw-fair-industry-practices-accountability-113091901135_1.html) (accessed on 8 November 2014).

<sup>39</sup> Sirish B. Patel, 'Real Estate Bill: Naïve to think that it will solve all problems' (15 November 2013) New Delhi *The Economic Times*, available at: [http://articles.economictimes.indiatimes.com/2013-11-15/news/44113610\\_1\\_real-estate-bill-project-manager-regulatory-authority](http://articles.economictimes.indiatimes.com/2013-11-15/news/44113610_1_real-estate-bill-project-manager-regulatory-authority) (accessed on 8 November 2014). See also 'Developers seek changes in Bill', (24 August 2013) New Delhi *The Hindu Business Line*, available at: <http://www.thehindubusinessline.com/industry-and-economy/real-estate/developers-seek-changes-in-bill/article5055899.ece> (accessed on 8 November 2014).

<sup>40</sup> 'Govt. to revise real estate Bill: Naidu', (20 September 2014) New Delhi *Business Standard*, available at: [http://www.business-standard.com/article/economy-policy/govt-to-revise-real-estate-bill-naidu-114091900900\\_1.html](http://www.business-standard.com/article/economy-policy/govt-to-revise-real-estate-bill-naidu-114091900900_1.html) (accessed on 8 November 2014).

<sup>41</sup> 'Rajya Sabha approves Real Estate (Regulation and Development) Bill' (11 March 2016) New Delhi *Economic Times*, available at <http://economictimes.indiatimes.com/wealth/real-estate/rajya-sabha-approves-real-estate-regulation-and-development-bill/articleshow/51350952.cms>

apartment owners as the equivalent of land-owners were not given clarity in terms of their rights against real estate developers or promoters. In more recent times, post the liberalisation of the Indian economy, there was an increase in urban immigration. It was noticed by the government that, the present legislations did not provide for an effective implementing arm for their various statutory provisions, as the flat purchasers could only approach consumer forum or civil court for acts of omission or commission regarding provisions of such legislations. There was further, a lack of transparency in the dealings of promoters leading to information asymmetry between promoters and flat owners. As a reaction to such issues that still continue to plague the real estate industry in India, new legislations have been enacted or are on the verge of being passed by the state governments as well as the central government.

The Real Estate (Regulation and Development) Bill, 2013 addresses the various concerns and problems faced by the buyers. The Real Estate (Regulation and Development) Bill, 2013 was submitted to the Standing Committee which has submitted its report on 13 February 2014. The key recommendations made by the Standing Committee are<sup>42</sup>: *firstly*, the Real Estate (Regulation and Development) Bill, 2013 should also regulate commercial and industrial real estate; *secondly*, the Real Estate Regulatory Authority should have the power to regulate projects as small as 100 square meters or three apartments from the existing 1,000 square meters or 12 apartments so as to not exclude a large number of small housing projects; *thirdly*, all real estate agents irrespective of whether they are facilitating the sale of a project covered by the Real Estate (Regulation and Development) Bill, 2013 should be required to register with the Real Estate Regulatory Authority; *fourthly*, the Committee recommends that the period from date of

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<sup>42</sup> PRS Legislative Research, Legislative Brief: The Real Estate (Regulation and Development) Bill, 2013, available at: <http://www.prsindia.org/administrator/uploads/media/Real%20Estate/Real%20Estate%20-%20Legislative%20Brief.pdf> (accessed on 13 March 2015).

allotment within which the promoter must rectify any structural defects should be increased from two to five years among others. The recommendations made by the Standing Committee further strengthens the protection of the consumers. The bill was passed by both houses of the Indian Parliament and now awaits the President's assent and consequent notification.

While there have been no empirical studies taking into account the rights of Indian apartment owners specifically, there have been a number of reports of the Ministry of Housing and Poverty Alleviation that bring out the need for adequate housing for India's still-growing population. Current estimates suggest that the Indian populace, particularly the lower income group and economically weaker sections of society face a housing shortage of upto 18.78 million dwelling units<sup>43</sup>. High-end apartments and condominiums are however, an entirely different matter. Estimates of unsold inventory held by a group of leading Mumbai developers alone now stands at approximately INR 534 billion - with an additional INR 368 billion of project launches in the pipeline<sup>44</sup> - equivalent to the total value of developed property sold in Mumbai in 2014. This is primarily because developers are by-and-large focused on launching luxury, high-end and mid-end housing projects that are considered 'safe'<sup>45</sup>.

Due to the substantial investments required to bridge the gap between demand for affordable housing and its availability, the Indian Government plans to promote public private partnerships, with a view to include private real estate developers and construction companies within the overall objective of meeting what seems to be a daunting shortage of affordable housing in India.

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<sup>43</sup> Twelfth Five Year Plan, Planning Commission, Government of India, Sage Publications, New Delhi, Volume II, p 336

<sup>44</sup> 'India's property hangover: Discounts, gold to cure multi-billion dollar backlog', 19 March 2015, Mumbai, *Reuters* available at <http://in.reuters.com/article/2015/03/19/india-property-idINKBN0ME2SA20150319> (accessed on 20 March 2015)

<sup>45</sup> 'What Will It Take to Bridge Urban Housing Shortage?', 17 October 2014, Mumbai, NDTV, available at <http://sites.ndtv.com/property/what-will-it-take-to-bridge-urban-housing-shortage/>, (accessed on 20 March 2015)



Given the enormous demand for housing in India coupled with the Indian government's efforts to meet that demand, the provisions of Real Estate (Regulation and Development) Bill, 2013 are certain to be considerably influential in the well-being of apartment ownership rights in India.