

DEVELOPERS ON THE FIRING LINE

The Courts in India has recently witnessed a surge in the number of complaints filed against the Developers. The developers have relentlessly ignored the demands of the buyers and have acted completely insensitive towards their interests. Soaring property prices, non-delivery of possession, faulty constructions and non-performance of contract by the developers are some of the common issues that are being faced by the consumers. Home buyers are becoming more emboldened to take on the might of real estate developers as they notice that the courts are taking a strict view on cases of fraud, cheating and untimely delivery of flats against builders.

The National Consumer Dispute Redressal Commission received over 1,700 housing related cases in 2014-15, vis-à-vis a few hundred cases in the previous years. A search on the Delhi High Court website revealed more than 40 cases pending against real estate developer Unitech Ltd and the website of the National Consumer Disputes Redressal Commission (NCDRC), showed 929 entries on searching for Unitech.¹ Also, a group of more than 50 homebuyers has approached the Maharashtra State Consumer Disputes Redressal Commission against DB Realty over delay in delivery of apartments at the developer's project DB Ozone in Mumbai. Another group of about 200 homebuyers at the same project is in the process of moving the National Consumer Disputes Redressal Commission against the builder. And a lot more similar complaints against other developers have been received by the National Consumer Disputes Redressal Commission in the recent years.

The Supreme Court and the National Consumer Dispute Redressal Commission has recently passed strict directions against the faulty Developers and ruled in favor of the aggrieved consumers. Some of the significant orders have been discussed below.

- The Supreme Court recently directed the builder in **Anupam Chakroborty and anr. Vs. Supertech Ltd & ors.** to pay 10 per cent of invested money per annum as investment returns to people who booked houses in its Noida Project and to clear any arrear within four weeks. The Hon'ble Court quoted "You sink or die, we are not concerned. You will have to pay back money to homebuyers. We are least bothered about your financial status".²
- Similarly, the Court in **Sahara India Commercial Corporation Ltd. Vs. Sahara Grace Consumer Grievances Association case**, asked Sahara India Commercial to deposit Rs3.5 crore to pay back investors who had bought flats in its Gurgaon project but did not receive possession on time.
- The Supreme Court has also asked real estate major **DLF** to hand over 50 apartments to buyers in Panchkula near Chandigarh by November this year and directed the developer to pay the buyers 9 per cent interest from 2014 for delay in giving them possession of their flat.
- The National Consumer Dispute Redressal commission in **Naveditta Dhawan Vs. United Limited**.³ passed an order directing that interest at the rate of 15% per annum shall be paid by the builder to the Complainant from the date of promise of possession till the possession is delivered to the Complainant. It

provided a 6 month deadline to the builder for the delivery of possession and said that if the Respondent is not in a position to deliver the property within the stipulated time, they shall be liable to refund the entire amount paid by the complainant to her, along with interest at the rate of 18% per annum.

- In **Swarn Talwar & Ors. Vs. Unitech Ltd.**⁴ the National Consumer Dispute Redressal Commission penalised the builder for delay in delivery and directed the respondent to refund the amount paid to it by the complainants, along with compensation in the form of simple interest on that amount, at the rate of 18% per annum from the date of deposit till the date of payment.
- Similarly, In **Pankaj Kothari and Ors. Vs Unitech Limited**⁵, the National Consumer Dispute Redressal Commission directed the builder to refund the entire amount paid to it by the complainants along with compensation computed @ 12% per annum on the principal payment within six weeks of the order. Increased number of rulings favoring home buyers brings in the hope of better days for Consumers. Also, the recently cleared **Real Estate (Regulation and Development) Act**, aims at bringing in transparency in real estate transactions and reducing the problems faced by the consumers due to unfair-trade practices of the developers. The Act provides for setting up of State level Real Estate Regulatory Authorities by the State Government to ensure consumer protection and standardization of business practices. It also requires for registration of the real estate project before it is offered for sale. Such measures on the part of the Courts and the Central government will not only help in eliminating the problem of late delivery but also ensures a bright future for the home buyers.
 1. <http://economictimes.indiatimes.com/wealth/real-estate/high-court-consumer-court-cases-galore-against-unitech-ltd-/articleshow/54039765.cms>
 2. <http://economictimes.indiatimes.com/wealth/real-estate/sink-or-die-investors-need-to-be-paid-back-sc-to-supertech/articleshow/54034951.cms>
 3. Appeal no.739 of 2015
 4. CC/347/2014
 5. CC/308/2014

Amendment to Rule 18 of Companies (Share Capital and Debentures) Rules, 2014

The Companies (Share Capital and Debentures) Rules, 2014 (“**Rules**”) lays down the procedure for issuance of shares and debentures, disclosures, filing requirements and other compliances under the Companies Act, 2013 (“**Act**”).

The following post seeks to analyse a key change introduced to Rule 18 vide an amendment notified by the Ministry of Corporate Affairs on 19th July, 2016 to the Rules (“**Third Amendment**”).

Rule 18 stipulates the term for redemption of debentures, appointment of a debenture trustee, creation of security to secure the issue of debentures and creating a reserve in the company’s books of accounts for repayment of debentures on maturity and the interest payable thereon.

The rules *inter alia* imposed an obligation on companies (private and public) to secure an issue of

debentures with their own assets having a value which is sufficient for due repayment of the amount of debentures.

The Third Amendment has introduced revisions to the above obligations as reproduced below:

Rule 18 (1) (b) is revised to read as, *“Such an issue of debentures shall be secured by the creation of a charge on the properties or assets of the company or its subsidiaries or its holding company or its associate companies, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon.”*

Further, Rule 18 (d) which provides for creation of security on *“any specific movable property of the company”* is now amended to read as, *“any specific movable property of the company or its holding company or subsidiaries or associate companies or otherwise.”*

The amendment has now relaxed the earlier position wherein a company could create a charge only on its property or assets. The amendment will now allow a company’s subsidiary or its associate company to provide security for issue of debentures. In the Indian scenario, the companies which often seek to raise capital for financing its projects resort to debt funding by issuance of secured Non-Convertible Debentures (“NCDs”) are real estate developers or infrastructure companies. Due to the lack of consolidation, adherence to GAAP and its asset pool being apportioned amongst its group companies, most businesses often find it difficult to comply with conditions stipulated in Rule 18. Add to that, it is not uncommon to find such group companies having common directors on its board which leads to a dead end in the form of Section 185 of the Act. In light of this, how will the changes brought in by the Third Amendment come to the rescue of these businesses?

For starters, the revision in sub-rule (b) of Rule 18 will allow a subsidiary to provide its immovable property and assets as security for securing the issue of NCDs by its holding company. The term “subsidiary” has been defined under the Act in Section 2 (87) as, *“in relation to any other company (that is to say the holding company), means a company in which the holding company-*

- *Controls the composition of the Board of Directors; or*
- *Exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies”*

It’s explicit that for the purposes of the Act, a subsidiary shall mean a company which owns not less than 51% of total share paid-up capital and/or it controls the composition of board of directors.

As for associate companies, there is an absence of clarity owing to the definition provided in Section 2 (6) of the Act, which reads as follows:

“In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

For the purpose of this clause the Explanation provides, “significant influence” means control of at least twenty per cent of total share capital, or of business decisions under an agreement.”

The term “control” is also defined under the Act which reads as follows:

“control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders’ agreements or voting agreements or in any other manner”

The above definition is exhaustive and it’s identical to Regulation 2 (e) of SEBI (SAST) Regulations, 2011. Therefore it can be concluded that the term “associate company” shall also include companies with majority of common directors or persons who have the right to control a company’s management or its operational policies directly or indirectly, by virtue of an agreement or in any other manner.

Though the conditions under Rule 18 have been relaxed, Section 186 (2) and (3) of the Act will continue to apply as the latter forbids a company from advancing any kind of loan, guarantee or security to any other body corporate exceeding 60% of its paid-up capital and free reserves or 100% of free reserves, whichever higher, except upon complying with the provisions of the section and relevant rules which *inter alia* entails passing of shareholder resolutions.

Thus, this will be looked at as a positive change within the industry, especially for companies desirous of raising capital by issuance of NCDs.