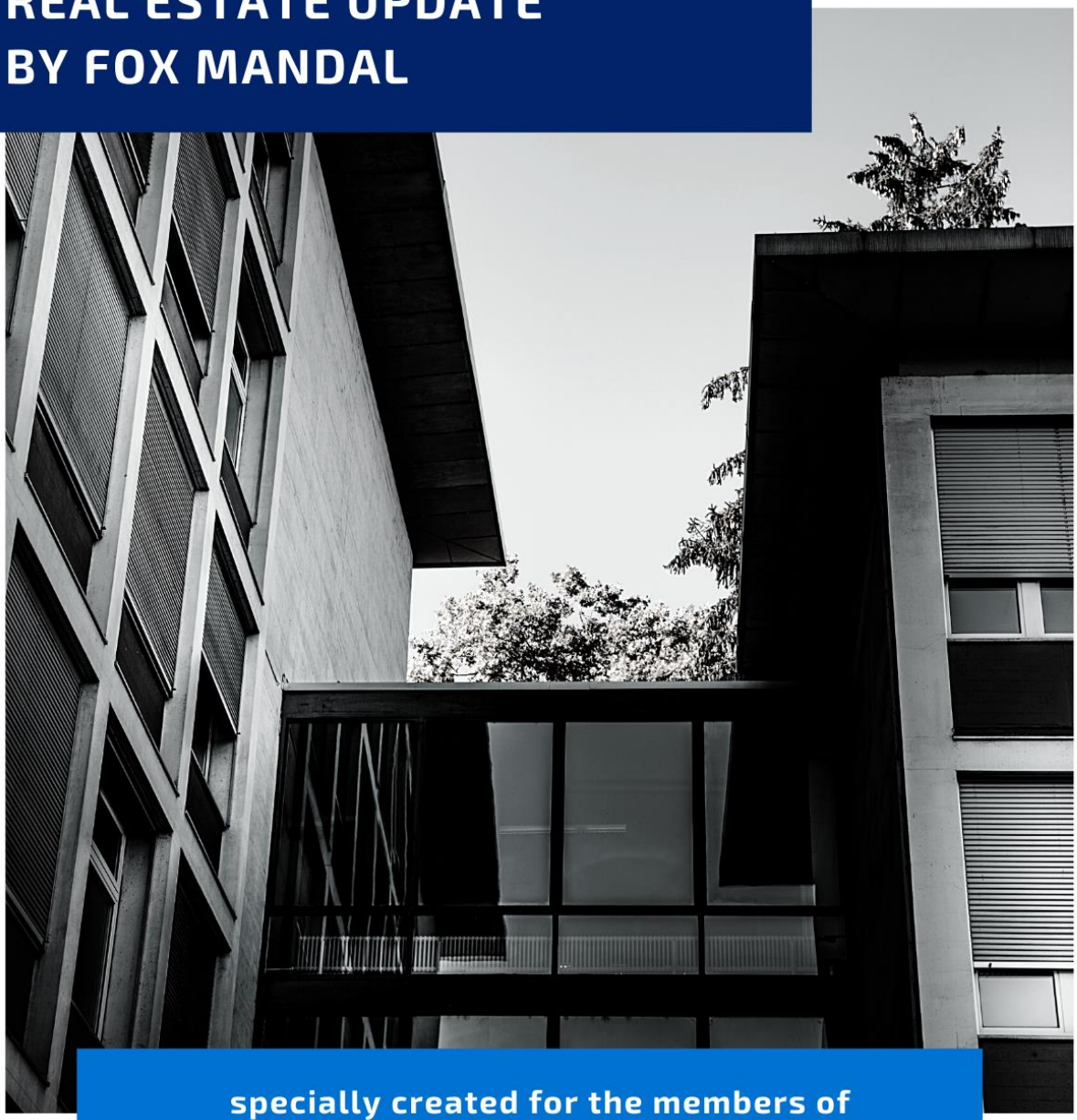
FoxMandal
Solicitors & Advocates

GROUND REALITY

MONTHLY
REAL ESTATE UPDATE
BY FOX MANDAL



specially created for the members of
CREDAI CHENNAI

GOVERNMENT ORDERS/NOTIFICATIONS

SC LIFTS EXTENSION OF LIMITATION PERIOD GRANTED POST-PANDEMIC

The Supreme Court has lifted the extension of the limitation period which was granted by it due to the pandemic and nationwide lockdown caused by COVID-19 through an order dated 27.03.2020 with effect from March 15, 2020. The Supreme Court has observed that there is considerable improvement in the situation with the country returning to normalcy and Courts and Tribunals functioning either physically or by virtual mode and therefore the extension must come to an end. Consequently, the following directions have been issued:

- The period from 15.03.2020 till 14.03.2021 would be excluded while computing the limitation period.
- Where the limitation would have expired during the excluded period, a 90 days grace period is provided from 15.03.2021 and where the balance period of limitation remaining as on 15.03.2020, is greater than 90 days, then such longer period.
- The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under:
    - Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996
    - Section 12A of the Commercial Courts Act, 2015
    - Provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881
    - any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.
    -

In addition, the guideline for containment zones is to be amended as follows:

"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as time-bound applications, including for legal purposes, and educational and job-related requirements."

[IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION. Suo Motu W.P.(Civil) No.3 of 2021]

PROCEDURE ON VIOLATION OF PRIOR CRZ CLEARANCE

The Ministry of Environment, Forest & Climate Change has issued a notification stating the procedure for dealing with violations arising due to not obtaining a prior CRZ clearance for permissible activities.

Citing a 2014 order of the Jharkhand High Court and 2020 order of the Supreme Court, the notification states that for the purpose of protecting and improving the quality of the coastal environment and abating coastal environment pollution, it is necessary that all entities not complying with CRZ notifications be brought under compliance of the environment statutes in an expedient manner.

The following procedure has been prescribed:

- Activities that are permissible but have failed to obtain prior clearance would be eligible for prospective clearance only when the project proponent applies for it to the concerned Coastal Zone Management Authority (CZMA) along with required documents as given in para 4.2 of the said CRZ Notification, 2011.
- For projects that have commenced construction without a prior CRZ clearance, the CZMA would assess the environmental damages caused by such projects and give specific recommendations in respect of activities, corresponding to the environmental and ecological damage assessed, to be taken by the project proponent within a period of 3 years from the date of clearance.
- The CZMA shall also give specific recommendation and certify that there is no violation of the CRZ norms.
- On fulfilment of the above, the project proponent may apply to the ministry for clearance on the 'PARIVESH' online portal.
- The project shall be appraised by the Expert Appraisal Committee which shall examine the adequacy of the Environment Management Plan, Comprising Compensatory Conservation Plan and Community Resource Augmentation Plan, endorse the CZMA recommendations and also decide the percentage of total project cost required to be utilized for implementation of the plans.
- The concerned CZMA/State Government shall oversee the implementation and enforcement of the plans. Further action should be taken up by the state governments or UT Administration or SPCB or UTPCC.

[Office Memorandum, F. No. 19-27/2015-IA.III]

SUPREME COURT

PRIOR PERMISSION OF RBI MANDATORY FOR SALE OF PROPERTY BY FOREIGN CITIZEN

The Supreme Court has held that the condition predicated in Section 31 of the 1973 Act of obtaining "previous" general or special permission of the RBI for transfer or disposal of immovable property situated in India by sale or mortgage by a person, who is not a citizen of India, is mandatory. A transfer cannot be effected without such permission and contravention would attract a penalty under Section 50 and other provisions of the Act. Moreover, the contention that no provision in the Act makes the transaction void or says that no title in the property passes to the purchaser in case there is a contravention of the provisions of Section 31, was of no avail.

In the instant case, a foreign citizen had transferred right, title and interest in a property by way of sale to one individual and later transferred a portion of the same property by way of a gift deed to another person. The sale was made with the prior permission of the RBI however, the gift deed was not backed by such prior permission.

It was held that before granting of such permission if the sale deed or gift deed is challenged by a person affected by the same directly or indirectly and the court declares it to be invalid, despite the document being registered, no clear title would pass on to the recipient or beneficiary under such deed.

The Court also distinguished the application of notification No. GSR 456 (E) dated 26.05.1993 of the RBI (Exchange Control Department) published in 1993 MPLT 242 (109) to the present case since it was limited to the transaction entered into by a foreign citizen of "Indian origin", to deal with real estate in India on certain conditions. This notification has no application to foreigners or so to say the person who is not a citizen of India, namely, foreign citizens.

The court further pointed out Section 63 of the 1973 Act clearly refers to property in respect of which contravention has taken place for being confiscated to the Central Government. The expression "property" therein would certainly take within its sweep an immovable property referred to in Section 31 of the Act.

The court relied on the statement of the then Finance Minister while tabling the Bill in the Lok Sabha that as a general policy foreign national cannot be allowed to deal with real estate in India. Besides that, a conjoint reading of Section 31 along with Sections 47, 50 and 63 reinforces that view. However, this decision had to be applied prospectively since there has been a paradigm shift in the general policy of investment by foreigners in India and more particularly, the 1973 Act itself stands repealed.

[Asha John Divianathan V. Vikram Malhotra & Ors., SC C.A. No. 9546 of 2010]

REFERENCE TO ARBITRATION UNDER SECTION 11 MAY BE REFUSED IF CLAIMS ARE EX-FACIE TIME BARRED

The Supreme Court has clarified that in rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make a reference for arbitration on receipt of an application under Section 11. It was further noted that the period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator. Given the vacuum in the law to provide a period of limitation under Section 11, the Apex Court has further suggested that the Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings.

In the instant case, BSNL had awarded a tender to Nortel for supplying GSM-based cellular mobile network in the southern region. However, on completion of the work BSNL deducted a substantial amount towards liquidated damages and other levies. Nortel's claim for payment was rejected by BSNL and 5 years later when it requested arbitration, the request was rejected for being time-barred. Nortel applied to the Kerela High Court which referred the case to arbitration. BSNL's review petition was dismissed and therefore it filed a civil appeal with the Supreme Court.

The Court observed that since no specific Article of the Limitation Act, 1963 applied to the filing of an application in a court of law under Section 11, the residual Article would become applicable. The effect is that the period of limitation to file an application under Section 11 is 3 years from the date of refusal to appoint the arbitrator, or on expiry of 30 days, whichever is earlier. Since the application under Section 11 was filed by Nortel within the period of 3 years of rejection of the request, it was well within the limitation period prescribed under Article 137 of the Limitation Act.

The court further pointed out that the issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. Applying the "tribunal versus claim" test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the arbitral tribunal either as a preliminary issue or at the final stage after evidence is led by the parties.

However, while exercising jurisdiction under Section 11 as the judicial forum, the Court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time barred and dead, or there is no subsisting dispute. Applying the law to the facts of the instant case, it was clear that where the claims were ex facie time-barred by over 5 ½ years since Nortel did not take any action whatsoever after the rejection of its claim by BSNL. Moreover, there was not even an averment either in the notice of arbitration, or the petition filed under Section 11, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Until there was a pleaded case specifically adverting to the applicable Section, and how it extended the limitation from the date on which the cause of action originally arose, there could be no basis to save the time of limitation. Hence Nortel's application to the High Court under Section 11 was dismissed.

[BSNL V. Nortel Network India Pvt. Ltd., C. A. Nos. 843-844 OF 2021]

HIGH COURT

RERA REGISTRATION NOT REQUIRED IF PART OCCUPANCY CERTIFICATE WAS ISSUED BEFORE DEADLINE

The Bombay High Court has held that registration under the provisions of Section 3 of the RERA Act was not required for a phase of a project if the part occupancy certificate in respect thereof had been obtained/issued by the Mumbai Metropolitan Region Development Authority (MMRDA) before the expiry of the three-month window provided for registration of ongoing projects i.e. 1st August 2017. Further, the Adjudicating Officer had no jurisdiction to entertain the complaint as the subject project did not require registration in terms of Section (3) of the Act. This was solely within the sphere of powers of the Authority to pass the necessary orders and directions pertaining to aspects of registration of the project or part thereof in terms of Section 3 read with Section 31 of the Act, being one of its functions under Section 34 of the Act.

In the instant case, a writ petition had been filed by developers seeking a declaration that they were not required to register a phase of their project up to 40th Floors with RERA since they had obtained part occupancy certificate prior to the deadline for registration of ongoing projects imposed by RERA. A few purchasers of flats within the said phase had filed multiple complaints and writs for revocation of the part occupancy certificate and the direction to register the ground plus 40 floors of the building with the MahaRERA. An order was passed by the Adjudicating Officer of MahaRERA deciding that it had jurisdiction to decide the matter of registration of the

project and granted compensation to the Complainants. The Order had been upheld by the RERA Authority.

The Court found that the Authorities had wrongly upheld the findings of the Adjudicating Officer on maintainability of the complaint because of a change of situation that had occurred in the matter of Mohammed Zain Khan Vs. Maharashtra Real Estate Regulatory Authority & Ors. (Writ Petition (L) No. 908 of 2018). The court observed that the decision in Mohd Zain Khan did not give any such finding other than providing a mechanism for entertaining complaints in respect of projects which although requiring registration, have not been registered.

The Court further cited that the Supreme Court had clearly held that the Adjudicating Officer has only the power to adjudicate compensation under Sections 12, 14, 18 and 19. It is the function of the Authority under Section 34 for registering and regulating the Real Estate Projects. Thus, it was the Authority who had the jurisdiction to decide on the registration of the project under the Act.

The court further noted that the RERA had made a clear distinction made between the projects 'that are ongoing projects' and 'projects which have received completion certificate before commencement of the Act'. The Real Estate Project or part of it which receives a part occupancy certificate during the three-month window denotes its completion and upon completion would not require to be registered.

Moreover, there was no substance in the Submission that the part occupancy certificate issued in the present case did not denote completion of that phase of the project and was only a conditional part occupancy certificate. The court accepted the contention that the scope of the proviso to Section 3 (1) and Section 3 (2) (b) can never be the same or overlapping and that would amount to or attributing surplusage to the legislature which could never have been the intention.

[Macrotech Developers Ltd. V. State of Maharashtra & Ors, BHC, W.P. No. 1118 of 2021]

TAMIL NADU REAL ESTATE REGULATORY AUTHORITY (TNRERA)

NO COMPENSATION IF AGREEMENT DOES NOT PROVIDE FOR IT

An allottee of a dwelling unit, purchased in No-Profit-No-Loss scheme under a railway welfare project, was denied compensation for delay in possession, failure to provide open car parking and

mental agony. The Tamil Nadu Real Estate Regulatory Authority (TNRERA) observed that there was neither a construction agreement nor a specific date had been provided for handing over the dwelling unit. Further, the brochure specifically stated that no interest or compensation was payable if the construction of the dwelling unit was delayed for any reason whatsoever.

Moreover, the compensation claimed for failure to provide car parking was dismissed because the complainant had neither opted nor paid for the same as per the terms of the agreement. The complainants claim for compensation for the failure of registration of the property despite repeated persuasion did not hold water because the court observed that there was no documentary evidence of such request and it was the duty of the complainant to get a draft sale deed and required stamp paper ready to get the registration process done. The complainant was further not entitled to any compensation for mental agony.

[R. Venkataraman Vs. MD, Indian Railway Welfare Organization, TNRERA CCP No. 341 of 2019]

MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY (MahaRERA)

PENALTY IMPOSED ON PROMOTER FOR NON REGISTRATAION OF PROJECT AND FAILURE TO FORM SOCIETY/ASSOCIATON

The promoter of a real estate project in Mumbai, admeasuring more than 3000 sqm containing 21 flats, was imposed a penalty of 70 lakhs under Section 59 of the RERA Act for entering into an agreement of sale of the flats before registration of the project with RERA which constituted a clear violation of Section 3 of RERA. A fine of 30 lakhs was further imposed for the breach of Section 11(4)(e) of the Act which casts the responsibility on the promoter to form the association or society of the allottees.

The promoter was further under the contractual obligation to refund the excess GST amount collected by him with interest. In addition, the promoter was directed to remove the additional construction, encroachment and leave the refuge area vacant as any alternation to sanctioned plans/layout and specifications cannot be carried out without prior written consent of at least 2/3rd of the allottees. Moreover, the promoter was directed to refund proportionate consideration with simple interest for the reduced size of apartment delivered than what was agreed in the sale agreement. The promoter had also added costs in a disguised manner i.e. for changing the name on the electricity bill which was directed to be refunded. Finally, the promoter was obligated to obtain a conveyance deed/completion certificate as per Section 17.

The MahaRERA further directed the Secretary to bring to the notice of the Chairperson that when registration certificate was renewed/ extended, a fresh certificate was issued, and the computer system automatically deleted the first one. It caused inconvenience to the Authority while locating the first registration certificate and identifying the date of issuance. Therefore, provision must be made to keep all certificates in its record and in case of its renewal/extension, its remark is put on the first certificate.

The MahaRERA also distinguished between a source complaint and a complaint by an aggrieved under Section 31 of the Act and directed the Secretary to highlight to the Chairperson that 'Source Complaint' was a misnomer that must be changed to 'Source Information'. The MahaRERA clarified that the mechanism of 'Source Complaint' had been devised only for the limited purpose of enabling informants to bring unregistered projects that required registration to the notice of the Authorities without the payment of any fees and the option to either participate in the enquiry or abstain from it. However, a complaint under Section 31 of the Act could only be filed by an aggrieved person for any violation or contravention of the provisions of RERA and required court fees.

[Dayaram Shetty & Harinakshi Shetty Vs. Mahimkar Builders & Developers, MahaRERA Complaint No. SC10001357]

Authors: Jayaprakash Padmanabhan| Partner | p.jayaprakash@foxmandal.in
Lakshmi Kandasubramanian |Associate | lakshmi.k@foxmandal.in