

Date: 07.02.2023

To

Principal Secretary to Government,
Law Department,
Ground Floor, Vidhana Soudha,
Bangalore-560001

Sub: Bringing to the notice issues with legal framework of apartments and seeking corrective actions

Sir/madam,

We, the Bangalore Apartments' Federation (BAF), is a representative body of more than 1100 apartment associations in Bangalore comprising about 3 lakhs apartment units. As the largest representative body of apartments in the State, we would like to present our views on the existing legal framework of apartments, its practice and suggestions for your kind consideration through the enclosed note titled "NOTE ON ISSUES WITH LEGAL FRAMEWORK OF APARTMENTS".

Contents of the note

1. Our view on the Karnataka Apartment Ownership Act 1972 and ownership status of apartments (paragraph 1 to 8)
2. Issues with registration of conveyance of apartment units (paragraph 9 to 15)
3. Shortcomings in the implementation of the Act and suggestion to correct it (para 16)
4. Consequences suffered by apartment owners due to incomplete implementation of the Act (paragraph 17)
5. Our view on apartment associations (paragraph 18 to 27)
6. Issues apartments are facing due to invalidation of KSRA registration of apartment associations (paragraph 28 to 31)

Request for Action

1. Complete implementation of the Karnataka Apartment Ownership Act 1972 by sufficiently amending the Karnataka Registration Rules 1965, the Karnataka Apartment

Rules 1974 and municipal/local body/revenue rules as described in paragraph 16 of the note

2. Notify the rules for competent authority for the Act
3. Assign a department for the Act and form a secretariat
4. Issue a clarification for apartment associations registered under KSRA as described in paragraph 31 of the note

Further, we request you to grant us an opportunity to meet you and explain our view as early as possible.

Awaiting a favorable response,
Yours faithfully,

Hareesh Sivaraman,
Member- Legal & Statutory Track,
Governing Council,
Bangalore Apartments' Federation

NOTE ON ISSUES WITH LEGAL FRAMEWORK OF APARTMENTS

1. The Karnataka Apartment Ownership 1972 was enacted five decades ago with objects and reasons that state “Consequent upon the shortage of lands in urban areas, the majority of the citizens of urban areas of the State cannot think in terms of owning houses on individual basis. Though there is a tendency to construct multi-storeyed flats, apartments and the like on ownership basis, intending persons cannot purchase flats, tenements, or apartments in multi-storied building as they will not have a marketable title thereto and cannot obtain any loan by mortgaging such flats, tenements, etc. Consequently tenements constructed by the Housing Board for example cannot be sold to the tenants who cannot raise any loan on the security of such tenements with the result that an enormous amount of capital will be locked up, which can be utilised for new constructions to meet the increasing demands for housing. It is, therefore, considered expedient that each apartment should for all purposes constitute a heritable and transferable immovable property, and that suitable legislation should provide for all matters connected therewith”.
2. Whereas, **section 4(Status of apartments)** of the act state that “Each apartment, together with its undivided interest in the common areas and facilities appurtenant to such apartment, shall for all purposes constitute heritable and transferable immovable property within the meaning of any law for the time being in force in the State: and accordingly, an apartment owner may transfer his apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment by way of sale, mortgage, lease, gift, exchange or in any other manner whatsoever in the same manner to the same extent and subject to the same rights, privileges, obligations, liabilities, legal proceedings and remedies as any other immovable property, or make a bequest of the same under the laws applicable to the transfer and succession of immovable property”.
3. Whereas, **subsection 2 of section 6(Common areas and facilities)** state that “The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the Declaration shall have permanent character, and shall not be altered without the consent of all of the apartment owners expressed in an amended Declaration duly executed and registered as provided in this Act. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains, and shall be deemed to be conveyed or encumbered”.

with the apartment even though such interest is not expressly mentioned in the conveyance or other instrument”.

4. Whereas, **subsection 1 of section 9(Encumbrances against apartments; removal from, encumbrances, effect of part payment)** state that “Subsequent to recording the Declaration as provided in this Act, and while the property remains subject to this Act, no encumbrance of any nature shall thereafter arise or be effective against the property. During such period encumbrances may arise or be created only against each apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment, in the same manner and under the same conditions in every respect as encumbrances may arise or be created upon or against any other separate parcel of property subject to individual ownership”.
5. Whereas, **subsection 2 of section 14(Removal from provisions of this act)** states that “Upon the removal of the property from the provisions of this Act the property shall be deemed to be owned in common by the apartment owners. The undivided interest in the property owned in common which shall apportion to each apartment owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities”.
6. Whereas, **section 29(Removal of doubt)** state that “For the removal of doubt, it is hereby declared that the provisions of the Transfer of Property Act, 1882, shall in so far as they are not inconsistent with the provisions of this Act, apply to every apartment together with its undivided interest in the common areas and facilities appurtenant to such apartment as those provisions apply in relation to any immovable property, and the provisions of this Act shall take effect, notwithstanding anything to the contrary contained in any contract”.
7. Further, Sections 6(2), 9(1) and 14(2) imply that encumbrance on the land should be recorded with undivided interest appertain to each apartment unit while executing deed of declaration. Section 9(1) prohibits recording encumbrance thereafter against the property and encumbrance can only be recorded against each apartment unit.
8. Though the Act grants status of transferable immovable property with exclusive ownership and possession for each apartment unit, the common built up area and the land remain in joint ownership model. The Act thereby creates a special case (by creating exclusive ownership for part of property) in “tenancy in common” that otherwise would have been created by section 45 (joint transfer for consideration) of

the Transfer of Property Act 1882. Hence the Karnataka Apartment Ownership Act 1972 should be seen as a supplement to the Transfer of Property Act 1882.

Illegal registration of conveyance

9. Though the Karnataka Apartment Ownership Act 1972 is available that grants transferable immovable property status for apartment units, the State continues the practice of conveying apartment units through sale deed, an instrument defined in section 54 of the Transfer of Property Act 1882.
10. Though conveyed through sale deeds (and not under the provisions of the Karnataka Apartment Ownership Act 1972), apartment units are treated as transferable immovable property with exclusive ownership. Registration office even creates encumbrance for individual apartment units in an apartment building and allow mortgaging of apartment units without permission from other co-owners.
11. Registration office while registering a conveyance deed under section 17 of the Registration Act and applying stamp duty, has the responsibility to ensure the subject that is getting conveyed is indeed an immovable property under law.
12. Registration office has the responsibility to ensure the sanctioned plan is attached with the conveyance deed if the conveyance deed has reference to such a plan. They are also responsible to ensure description of property in the conveyance deed being registered is correct and as per the attached plan.
13. Despite having provisions for sufficient checks, conveyance deeds of many apartment units are getting registered which are not even available in sanctioned plans approved by local/planning authority.
14. We brought these issues related to registration of conveyance of apartment units to the notice of the Inspector General of Registration and Commissioner of Stamps through e-letters dated 02.12.2022 and 23.12.2022 and requested corrective action under section 69 of the Registration Act 1908. We also met AIGR(Law) on 15.12.2022 regarding this. Representation to IGR is enclosed herewith.
15. We would also like to bring to your notice the circular issued by the office of Inspector General of Registration and Commissioner of Stamps bearing no. STD 188/91-92 dated 18th February 1992 which flagged the issue of registration sale deed of undivided

interest without bringing them within the purview of the Karnataka Apartment Ownership Act 1972. Circular STD 188/91-92 is enclosed herewith

Incomplete implementation of the Act

16. Though the Karnataka Apartment Ownership Act 1972 was enacted and notified five decades ago, many aspects of the Act have not been implemented yet.

- a. The Karnataka Registration Rules 1965 has not been amended yet suitably to include following provisions of the Karnataka Apartment Ownership Act 1972
 - i. Subsections 1 and 2 of Section 9 (Encumbrances against apartments; removal from, encumbrances, effect of part payment)
 - ii. Subsections 1, 2, 3, 4 and 5 of Section 13 (Declarations, deeds of apartments and copies of floor plans to be registered)
 - iii. Subsections 1 and 2 of Section 14 (Removal from provisions of this Act)
 - iv. Instrument to amend bylaws as per subsection 1 of Section 16
 - v. Section 19 (Charge on property for common expenses)
 - vi. All subsections of Section 22 (Disposition of property; destruction or damage)
- b. Rules are not formed under the Karnataka Apartment Ownership Rules 1974 for the following
 - i. Rule for computing undivided interest in common areas and facilities as mentioned in subsection 1 of Section 6 (Common areas and facilities)
 - ii. Rule to remove apartments and percentage undivided interest in the common areas and facilities from the charge or encumbrance as mentioned in subsection 2 of Section 9 (Encumbrances against apartments; removal from, encumbrances, effect of part payment)
 - iii. Rule for amending declaration as mentioned in subsection (k) of Section 11 (Contents of Declaration) and subsection 1 of Section 16 (Bye-laws and their contents)

- iv. Rule for removing a property from provisions of the Act as mentioned in Section 14 (Removal from provisions of this Act)
 - v. Rule for resubmission to the Act as mentioned in Section 15 (Removal no bar to subsequent resubmission of property to this Act)
 - vi. Rule for applying charge on property as mentioned in Section 19 (Charge on property for common expenses)
 - vii. Rule for Section 22 (Disposition of property; destruction or damage)
- c. Competent Authority
- Rules are not framed or notified for the competent authority defined in subsection (i) of Section 3 of the Act.
- d. Municipal/Local body/Revenue rules need to be formed for the following
- i. Rule to apply mutation on land while creating khata for apartment units
 - ii. Rule to implement Section 18 of the Act
 - iii. Rule to effect sections 9(1), 14 and 22 of the Act on land khata.
 - iv. Rule to ensure approval of sanction plan only for residential apartments as per section 2 of the Act
- e. Not sure which department of the Government is assigned to administer this Act. Preferably, this Act should be brought under the Housing Department and need a secretariat similar to the one the department has for RERA 2016.

Consequences of incomplete implementation of the Act

17. Adverse consequences of incomplete implementing the Act are
- a. Rampant illegal constructions despite subsection 2 of section 13 mandate a verified statement from an architect certifying that the building is an accurate copy of portions of the plans of the buildings as filed with and approved by the local authority within whose jurisdiction the building is located as part of declaration and such a statement has to be recorded before first conveyance of any apartment. Had this been implemented and enforced, not a single apartment would have been built illegally or deviating from the sanctioned plan.

- b. Conveyance deeds of many apartments have been registered that are not present in the sanctioned plan.
- c. Conveyance deeds are being executed even before even half of the construction of the project gets completed. Once developers receive complete disbursement of funds from apartment purchasers and their financiers, they take their own time without honoring timeline for handing over ownership and possession of the apartment units as per sale agreement while apartment purchasers struggle with regular EMIs and rent together for years. This is the major issue the RERA is handling even today.
- d. Encumbrance on the land not getting recorded in majority of the cases where conveyance of apartment units and undivided share registered through sale deed, an instrument under provisions of the Transfer of Property Act 1882.
- e. Encumbrance on the land not getting recorded even while executing deed of declaration.
- f. Not recording encumbrance on the land raises questions on ownership status and creates hurdles in disposition of property due to destruction or damage as well as removal from the Act for redevelopment.
- g. In some cases developers mortgaged land of apartment even after executing sale deeds and without consent or even knowledge of apartment owners. This could have been avoided if encumbrances were recorded properly.
- h. Stamp duty and registration fee are not notified for registration of declaration and this leads to arbitrary application of stamp duty for registration of declaration.
- i. Since competent authority is not functioning and not ready to accept declaration and deeds of apartments,
 - i. arbitrary formats of declarations get registered without even a sanction plan attached or a verifying certificate from an architect.
 - ii. Conveyance are getting registered (both first sale and resale) through sale deed instead of apartment deed

- iii. A false impression has created that declaration is for formation of association while as per the law, it is a process of creating apartment units as transferable immovable property and ensuring rights over common property including land through joint ownership model.
- iv. Competent authority not accepting declaration or deeds of apartment make the compliance as per the law incomplete.
- j. Apartment owners are unable to amend bylaws and are forced to follow bylaws drafted by developers. They are also unable to amend declarations to update person to receive service from time to time.

Apartment ownership models and management

18. Section 11 of the Karnataka Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) 1972 (hereinafter referred as KOFA 1972) read with rule 9 of the Karnataka Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Rules 1975 (hereinafter referred as KOFR 1975) give 3 options for ownership model of an apartment
- a. Cooperative Society (under the Karnataka Cooperative Societies Act, 1959)
 - b. Company (under the Companies Act)
 - c. Association of flat-takers (under the Karnataka Apartment Ownership Act 1972)
19. The clause h of subsection 2 of Section 3 of KOFA 1972 mandate that promoter state in writing, the precise nature of the organization of persons to be constituted and to which title is to be passed, and the terms and conditions governing such organization of persons who have taken or are to take the flats. Hence this facilitates flat purchasers to opt a suitable ownership model from the three options available to them.
20. The sub rule d of Rule 5 of KOFR 1975 mandate that the precise nature of the organization to be constituted of the persons who have taken or are to take the flats or apartments to be included in the agreement for sale.
21. The clause e of sub section 1 of Section 11 of the Real Estate (Regulation and Development) Act 2016 (hereinafter referred as RERA 2016) mandate that promoter to enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same under the local law, if available.

22. Paragraph 19 of agreement for sale in the rules for RERA 2016 notified vide notification no. DOH 8 RERA 2017 dated 12.06.2020 states that “The Promoter has assured the Allottees that the project in its entirety is in accordance with the provisions of the Karnataka Apartment Ownership Act, 1972(Karnataka Act 17 of 1973) and the Karnataka Ownership Flats (Regulation of the Promotion of the Construction, Sale, Management and Transfer) Act, 1971”. Thereby making KOFA 1972 as local law for the purpose of The clause e of sub section 1 of Section 11 of the RERA 2016.
23. A vast majority of flat purchasers in Karnataka have opted for “Association of flat-takers” as preferred ownership model.
24. The subsection d of Section 3 of the Karnataka Apartment Ownership Act 1972 states that "association of apartment owners" means all of the apartment owners acting as a group in accordance with the bye-laws and Declaration”.
25. The subsection 42 of Section 3 of the General Clauses Act 1897 states that ““person” shall include any company or association or body of individuals, whether incorporated or not”.
26. The subsection zg of Section 2 of RERA 2016 states that “Person” includes,—
- (i) an individual;
 - (ii) a Hindu undivided family;
 - (iii) a company;
 - (iv) a firm under the Indian Partnership Act, 1932 (9 of 1932) or the Limited Liability Partnership Act, 2008 (6 of 2009), as the case may be;
 - (v) a competent authority;
 - (vi) an association of persons or a body of individuals whether incorporated or not;
 - (vii) a co-operative society registered under any law relating to co-operative societies;
 - (viii) any such other entity as the appropriate Government may, by notification, specify in this behalf;
27. The subsection 42 of Section 3 of the General Clauses Act 1897 and subsection zg of Section 2 of RERA 2016 confirm that “association of apartment owners” as defined in

subsection d of section 3 of the Karnataka Apartment Ownership Act 1972 has legal status as Person. Hence there is no need of any other registration of apartment association and no such provision of registration of association is given in the Karnataka Apartment Ownership Act 1972.

KSRA registrations and aftermath of court verdicts

28. The Karnataka Societies Registration Act 1960, hereinafter referred as KSRA 1960, has never had a provision of registering apartment associations. Despite that, the Registrar of Societies allowed many apartments to register under this Act.
29. Since 2018, Hon'ble High Court of Karnataka has struck down KSRA registration of many apartment associations. In each case, Hon'ble High Court advised apartment owners to register under provisions of the Karnataka Apartment Ownership Act 1972.
30. This situation led to the creation of small groups of people in many apartments, rejecting to contribute their share for the common expenses and other common liabilities claiming either association is not present or association is not authorized to collect maintenance.
31. The legal system as well as administration so far ignored the fact that these apartments are conveyed through a sale deed under the Transfer of Property Act 1882. All owners thereby own interest in the property proportional to the undivided share. Hence every owner has the right to profit and has responsibility to contribute to the share of liabilities proportional to the undivided share they enjoy. Government has not yet issued any clarification regarding this yet.