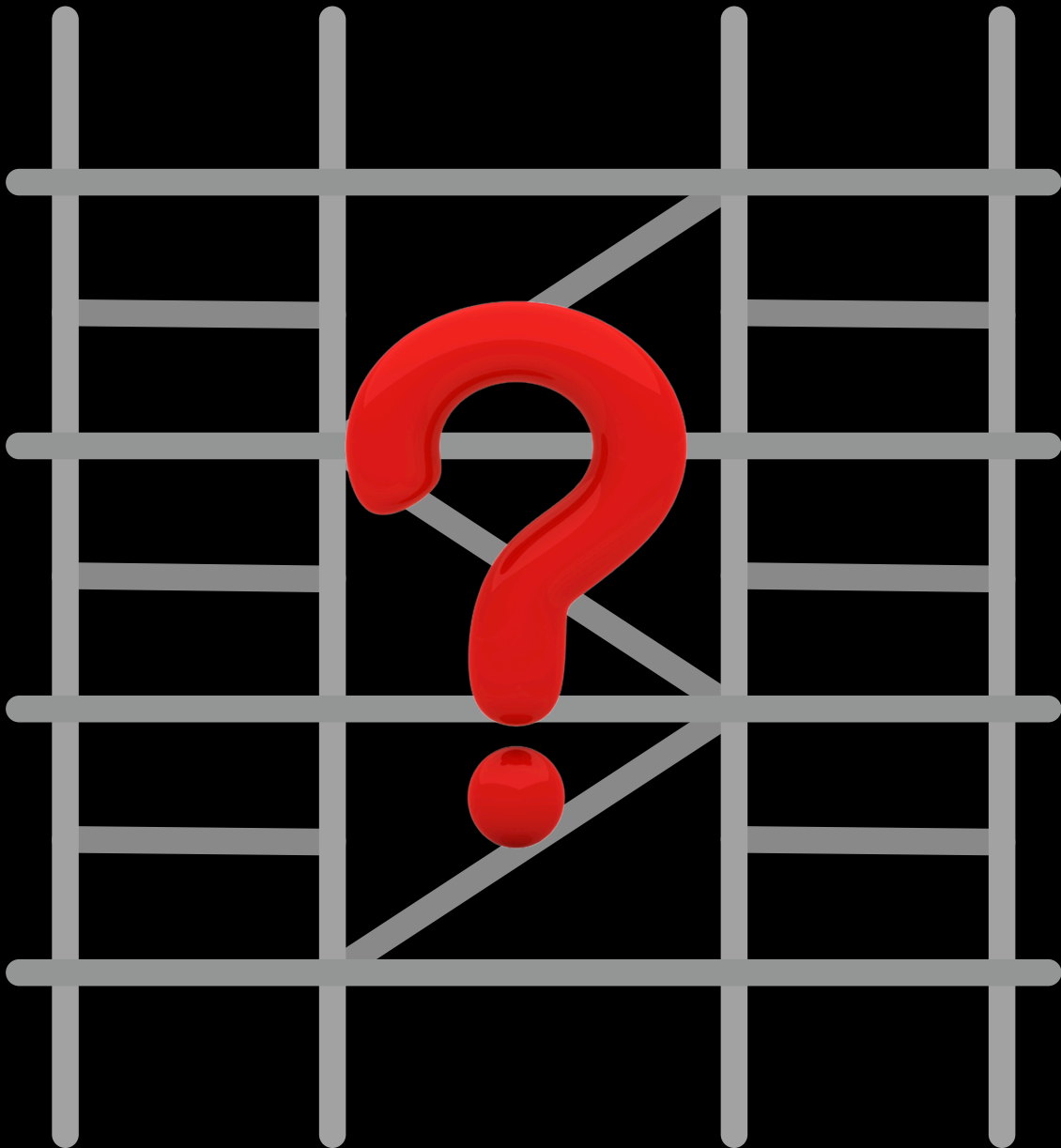


# FROM PRIORITY TO PREJUDICE – THE LENDER’S DILEMMA IN THE RERA REGIME

June 2025



## I. Background

The real estate sector continues to play a pivotal role in India's economic development, contributing to an estimate of 13% (thirteen percent) of the India's GDP in the financial year 2024-25<sup>1</sup>. One of the crucial factors contributing to the growth of the real estate market in India has been the significant reform in the legal landscape, such as the enactment of the Real Estate (Regulation and Development) Act, 2016 ("**RERA**"), including the establishment of various Real Estate Regulatory Authorities ("**Authorities**", each an "**Authority**") thereunder, and bolstering of debt recovery laws such as the introduction of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). However, these regulatory reforms have also brought about some uncertainties for lenders, and hence, recovery of dues under the regulatory regime governing the real estate market continues to be a significant hurdle for banks and other financial institutions.

When financing construction of a real estate project<sup>2</sup>, a lender would typically require the promoter to provide security interest over such project, including mortgage over the units proposed to be constructed in such project, together with the undivided proportionate share of the underlying project land attributable to such units. For enforcement of such security interest, various statutory rights are available to lenders, including, *inter-alia*, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**"), the Recovery of Debts and Bankruptcy Act, 1993 and IBC.

However, post the introduction of the RERA, lenders have been facing certain unique hurdles in enforcement of their security. One such issue is that lenders are being treated as 'promoters' under RERA in certain instances. Another issue is that the Authorities have been time and again imposing additional obligations on lenders to ensure compliance with the provisions of RERA, even though the original onus to comply with these requirements was on the promoters. This paper discusses the critical judicial decisions and the present regulatory environment that has led to the current predicament for lenders in the real estate market.

## II. Lenders as promoters under RERA

It may be noted that a promoter has been defined under Section 2(zk) of the RERA to include "a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees." (emphasis added)

In one of its earliest decisions on this issue, the Haryana Authority in the matter of *Deepak Chowdhary v. PNB Housing Finance Limited*.<sup>3</sup> ("**Deepak Chowdhary Matter**"), took a view that PNB Housing Finance Limited ("**PNB**") who was the lender to Supertech Limited ("**Supertech**"),

<sup>1</sup> The Hindu: *Outlook 2025: Emerging trends of real estate sector* dated January 4, 2025. Refer: <https://www.thehindu.com/real-estate/real-estate-properties-construction-buildings-2025/article69028297.ece#:~:text=India's%20real%20estate%20market%20is,by%20its%20centenary%20of%20independence>.

<sup>2</sup> 2(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.

<sup>3</sup> *Deepak Chowdhary v. PNB Housing Finance Limited*, Haryana Authority order dated September 11, 2020, in complaint case no. 2145 (earlier 2031) of 2020.

would fall within the definition of a 'promoter' under RERA, as Supertech had assigned its rights in the real estate project to PNB under the garb of the mortgage deed executed by Supertech in favour of PNB. The Haryana Authority interpreted the definition of 'mortgage' under Section 58 of the Transfer of Property Act to hold that:

*“By the very definition, vide a mortgage, a transfer of interest in specific immovable property is created for the purpose of securing payment of money. Therefore, by virtue of the definition of the word “assignment” as per Black’s law Dictionary, it includes any person on whom interest is transmitted by a transfer which could include vide mortgage. The definition of the promoter which includes the word “assignee” will therefore take in its purview a bank/financial institution on whom an interest is created by way of transfer i.e. mortgage.*

Following the same logic, the Rajasthan Authority in *Mukesh Agarwal v. SNG Real Estate Private Limited*,<sup>4</sup> referred to the decision of the Haryana Authority in the Deepak Chowdhary Matter and held that the definition of promoter which includes an 'assignee' would take within its purview a lender is whose favour an interest has been created by way of mortgage. It was further held that:

*“53. Thus, being an assignee of the promoter, the respondent Bank falls within the ambit of the definition of promoter as provided under section 2(zk) of RERA Act. Accordingly, the respondent Bank shall be treated as promoter for all purposes of RERA Act; and, in that capacity, it is liable to fulfill all the obligations of promoter towards the allottees as provided under RERA Act and rules and regulations made thereunder. And, as the respondent Bank is held to be a promoter of the project for the purposes of RERA Act. this Authority has jurisdiction to issue directions to it under section 37 of RERA Act”*

This view of the Rajasthan Authority was also upheld in an appeal filed before the Rajasthan Real Estate Appellate Tribunal.<sup>5</sup>

However, the Rajasthan High Court in the matter of *Union Bank of India v. Rajasthan Real Estate Regulatory Authority*<sup>6</sup> (“**Union Bank Matter**”), took a slightly narrower view than that of the Authorities and held that only a lender who has taken any action under Section 13(4) of SARFAESI<sup>7</sup> would be construed to be an assignee of the promoter under RERA. The relevant excerpt of the judgement has been reproduced below:

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<sup>4</sup> *Mukesh Agarwal v. SNG Real Estate Private Limited*, Rajasthan Authority order dated September 20, 2021, in Complaint No. RAJ-RERA-C-2020-3958.

<sup>5</sup> *Union Bank of India v. Mamta Kotia*, Rajasthan Real Estate Appellate Tribunal order dated March 25, 2025, in Appeal No. 4/2022 & Others.

<sup>6</sup> *Union Bank of India v. Rajasthan Real Estate Regulatory Authority*, AIR 2022 Raj 85.

<sup>7</sup> 13(4). *In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely: –*

- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;*
- (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:*

*Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:*

*Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;*

- (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;*
- (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.*

*“35. Clauses (a), (b) and (c) of sub-section (4) of Section 13 vest power in the secured creditor to take all steps as the borrower himself could take in relation to the secured asset. Clause (d) goes a step further and enables the bank to recover its dues directly from a debtor or the borrower who has acquired any of the secured assets. For all purposes thus the secured creditor steps in the shoes of the borrower in relation to the secured asset. This is thus a case of assignment of rights of the borrower in the secured creditor by operation of law. In other words the moment the bank takes recourse to any of the measures under sub-section (4) of Section 13, it triggers statutory assignment of right of the borrower in the secured creditor. Till this stage arises the bank or financial institutions in whose favour secured interest may have been created may not be in isolation in absence of the borrower be amenable to the jurisdiction of RERA. However, the moment the bank or the financial institution takes recourse to any of the measures available in sub-section (4) of Section 13 of the SARFAESI Act, RERA authority would have jurisdiction to entertain the complaint filed by an aggrieved person.” (emphasis added)*

There are 2 (two) key takeaways from the decision rendered by the Rajasthan High Court in the Union Bank Matter; firstly as a consequence of taking any action under Section 13(4) of the SARFAESI Act, such as taking possession of secured assets or assuming control over the management of the borrower’s business, a lender would fall within the ambit of an ‘assignee’ of the promoter, and secondly, the Authorities would have the jurisdiction to entertain complaints against such lenders who are considered to be ‘assignees’ of the promoters.

Interestingly, the judgment of the Rajasthan High Court in the Union Bank of India Matter was upheld by the Supreme Court of India (“**Supreme Court**”) in *Union Bank of India v. Rajasthan Real Estate Regulatory Authority*<sup>8</sup>, with a clarification that the jurisdiction of the Authorities to entertain complaints against lenders who have taken any recourse under Section 13(4) of SARFAESI, shall be limited only to cases where such complaints have been filed the home buyers to protect their rights. By way of this clarification, the Supreme Court has effectively barred promoters from forum shopping and initiating parallel proceedings against lenders under RERA.

Following the afore-mentioned decision of the Supreme Court, the Authorities have been applying the principles laid down in the Union Bank Matter and holding lenders accountable for obligations of promoters under RERA.<sup>9</sup> Some of the decisions of the Authorities have been discussed in the subsequent paragraphs of this paper.

In *Yes Bank Limited v. Mega Resources Limited*,<sup>10</sup> the West Bengal Real Estate Appellate Tribunal held that Yes Bank stepped into the shoes of the promoter and was therefore required to independently comply with all the pending obligations of the promoter under RERA and also under the agreements for sale executed with the allottees.

In the case of *Deepu Babu Abraham v. Ozone Homes Private Limited*,<sup>11</sup> the Tamil Nadu Real Estate Appellate Tribunal (“**TNREAT**”) went a step further and took a view that, a lender who had advanced monies to the homebuyers (and not the promoter) acted as an assignee of the

<sup>8</sup> *Union Bank of India v. Rajasthan Real Estate Regulatory Authority*, 2022 (2) KHC 112.

<sup>9</sup> Also see *Vijaykumar Manubhai Ved v. Better Builders and Infrastructure Private Limited*, Maharashtra Authority order dated February 6, 2025, in Complaint No. CC006000000429310; *Jyoti Verma v. ARG Infra Developers Private Limited*, Rajasthan Authority order dated January 9, 2023, in Complaint No. RAJ-RERA-C-2021-4459.

<sup>10</sup> *Yes Bank Limited v. Mega Resources Limited*, West Bengal Real Estate Appellate Tribunal order dated September 20, 2024 in Appeal No. 010/2024. An appeal in this matter is pending before the Calcutta High Court.

<sup>11</sup> *Deepu Babu Abraham v. Ozone Homes Private Limited*, Tamil Nadu Real Estate Appellate Tribunal order dated June 2, 2023 in CCP No. 121 of 2021.

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promoter, by placing reliance on a deed of guarantee entered between the lender, the promoter and the homebuyer, whereunder the promoter had guaranteed the obligations of the homebuyer.

However, contrary to the decision of the TNREAT stated above, the Maharashtra Authority, in the case of *Bharati Shah v. Better Builders & Infrastructure Private Limited*<sup>12</sup>, took a view that, in cases where the lender had advanced loans to allottees and not the promoter, if the lender decides to enforce its security under SARFAESI, the same will result in the lender stepping into the shoes of the allottee and not the promoter. Accordingly, in such instances the lender cannot be construed to be an 'assignee' of the promoter.

### III. Additional Obligations on Lenders under RERA

Several Authorities have issued circulars outlining specific compliance requirements for lenders who are transferees of promoters.<sup>13</sup> These include: (a) intimations to be given to each of the allottees of the enforcement of security which has resulted in a transfer of the project; (b) making necessary corrections of registration details; and (c) submission of an undertaking for complying with all obligations of the promoter under RERA and under the agreements for sale executed with the allottees. Interestingly, in the circulars, the Authorities have provided certain examples of such transfer to lenders, which include, *inter-alia*, takeover of secured assets under SARFAESI and invocation of pledge of shares of the promoter.

Furthermore, some of the Authorities have imposed certain additional compliances on all lenders to real estate projects registered in such State. For instance, the Chhattisgarh Authority<sup>14</sup> has directed all banks to sanction loans to promoters only for projects registered under RERA. Similarly, the Telangana Authority has directed all lenders to disburse loan amounts only into the designated RERA account of the promoter.<sup>15</sup>

### IV. Conclusion

To recap, if a lender has taken any actions for enforcement under Section 13(4) of the SARFAESI, such lender would step into the shoes of a promoter under RERA as its 'assignee' and is thereafter required to comply with the obligations applicable to promoters under RERA. The circulars issued by the Authorities as discussed above, also seem to suggest that a lender that has simply invoked a pledge of shares of the promoter would fall within the ambit of a transferee of a promoter for the purposes of RERA.

It may be pertinent to recall that SARFAESI was introduced to enable lenders to facilitate timely recovery and enforcement of security without the intervention of the courts. However, once RERA came into the picture, the Supreme Court in *Bikram Chatterji v. Union of India*,<sup>16</sup> took a view that,

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<sup>12</sup> *Bharati Shah v. Better Builders & Infrastructures Private Limited.*, Maharashtra Authority order dated April 28, 2023 in Complaint Nos. CC006000000193783 and CC006000000303719.

<sup>13</sup> Circular no. C/708/2024 titled 'Procedure for transferring or assigning promoter's rights and liabilities to a third party' by the Telangana Authority dated October 19, 2024; Circular no. 01/RERA GGM Circular 2020 titled 'Procedure for transferring or assigning of promoter's rights and liabilities in a real estate project to a third party under section 15 of the Real Estate (Regulation and Development) Act, 2016' by the Haryana Authority dated June 29, 2020; Circular No. KRERA/circular/ 02/2019 titled 'Procedure for transferring or assigning promoter's rights and liabilities to a third party' by the Karnataka Authority dated August 27, 2019; and Circular No. 24/2019 titled 'Procedure for transferring or assigning promoter's rights and liabilities to a third party' by the Maharashtra Authority dated June 4, 2019.

<sup>14</sup> Circular no. 99/RERA/2024 regarding 'Instructions for Real Estate projects regarding withdrawal of fund from RERA designated accounts' by the Chhattisgarh Authority dated April 19, 2018.

<sup>15</sup> Circular no. 989/TSRERA/2023 regarding 'TS RERA – Certain complaints filed claiming that builders are not utilizing the amount given by them.....for mandatory deposit of money into the RERA designated bank account' dated September 4, 2023.

<sup>16</sup> *Bikram Chatterji v. Union of India*, (2019) 19 SCC 161.

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in case of any conflicts between the provisions of SARFAESI and RERA, the provisions of RERA would prevail, thereby diluting rights of lenders. Now, holding lenders accountable as promoters, may be the final nail in the coffin, so far as taking enforcement action under SARFAESI is concerned. Consequently, IBC appears to be the only viable option left available for lenders in the real estate space to recover their dues.

On a separate note, by including a lender that has invoked its pledge over shares of a promoter as a transferee, the Authorities have also failed to appreciate that a mere invocation of pledge of shares by a lender does not tantamount to actual sale of shares to itself, as explained by the Supreme Court in the case of *PTC India Financial Services Limited v. Mr. Venkateswarlu Kari*.<sup>17</sup>

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<sup>17</sup> *PTC India Financial Services Limited v. Venkateswarlu Kari*, Supreme Court order dated May 12, 2022 in Civil Appeal No. 5443 of 2019.

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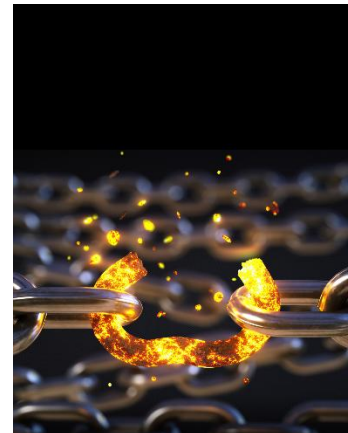
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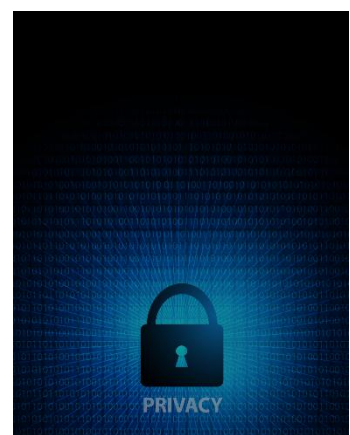
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