

Throwback on the Process of Registration of Condominium Properties

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Abstract— Most Condominium Property Developers, taking advantage of weaknesses in the procedural law on the registration of Condominiums, have dragged the Condominium Dwellers into a well woven cob web. Where, hopelessly Dwellers end up litigating against the Developer for fraud. However, in practical terms such a litigation situation is rare due to the lack funds to institute them. Hence, the objective of the research is to analyse the loopholes of the existing domestic procedural law on the registration of Condominiums. Legal research methodology was followed. The source of library based secondary data review was referred to. Furthermore, a number of interview sessions were conducted for primary method of data collection. The mixed method was adhered to when establishing the recognized objectives. The identified stakeholders were Condominium Dwellers, Condominium Developers and the experts in the field of law related to Condominiums. It is evident that most Condominium Dwellers are not aware of their inherent rights. Hence, without this understanding on the statutory rights, they have faced with a number of issues that emanate from the registration process of Condominiums; specific reference to lack of a real transfer of title due to the conditional sale the parties enter into, the risk of not being able to be compensated from the insurance claims in case of a damage to the building and several other major adverse consequences. Hence, the intended research outcome is to introduce a policy paper with recommendations aiming to assist the law making commissions when amending the existing domestic procedural legal framework related to the registration of Condominiums. Establishing the fact that, Sri Lanka should encourage the living in Condominiums to cope up with the increasing migrants to urban areas, it could be concluded that it is a timely requirement to make the Condominium Dwellers aware about their rights.

Keywords— Condominium Properties, Registration, Dwellers

I. INTRODUCTION

The term Condominium housing refers to a form of occupancy, or rather a system of ownership in a complex of dwelling units which are individually owned. In other words, these are where the owners have complete title to the respective individual unit while holding a shared interest in the common areas of the Property which are known as 'common elements'.

Colloquially, in Sri Lanka the term "apartments" is interchangeably used for "Condominiums" regardless of the form of ownership.

However, the area of study of this research is not an apartment with a short term ownership or rented space but residential spaces with permanent long term ownership.

Currently, the demand for living in Condominium Properties is at a rise; the reasons to which will be discussed in further areas to come.

Nonetheless, the driving need for 'mere shelter' has blind folded Dwellers of these Condominium Properties, against many cracks that are prevalent in the contracts that they enter into with the Developers of the Property.

Therefore, the area of study is the loopholes of the procedural law related to Condominium Properties, with specific reference to the registration process of the Condominium Property.

Hence, the rationale of this research is to voice out the unheard yearnings of the Dwellers of Condominium Properties who are unaware about their valuable rights; hence, have no bargaining power to fight for their own rights.

II. METHODOLOGY

Legal research methodology was followed. The source of library based secondary data review was referred to. Furthermore, a number of interview sessions were conducted for primary method of data collection. The mixed method was adhered to when establishing the recognized objectives. The identified stakeholders were Condominium Property Dwellers, Condominium Property Developers and the experts in the field of law related to Condominium Property.

III. RESULTS

The expected outcome of the research is to introduce a policy paper which would have a prime focus on amending the existing law on Condominium Property by introducing stricter procedural regulations on the process of the registration of the Condominium Properties.

Attention of the law making commissions is wished to be diverted towards the fact that the Condominium Property

Dwellers would be subjected to the undue suppression of the Condominium Property Developers if the law on Condominium Property is not amended with immediate effect keeping in mind that the demand for high rising residential buildings is at a rise.

This continuance of the silent treatment towards the area of registration process of Condominium Properties, would result in a high chance of increase in the litigations by the Condominium Property Dwellers against the Condominium Property Developers.

IV. DISCUSSION AND CONCLUSION

United Nations estimates suggest that the population of Sri Lanka, as at April 2017, is 20,881,868; an equivalent of 0.28% of the total world population. Despite of the declining nature of the yearly population growth rate, Sri Lanka ranks number 58 in the list of countries by population while holding a population density of 333 per Square Kilometre (total land area of Sri Lanka being, 62,702 Square Kilometres).

Noting that the population has been reflecting an upward trend, it can be seen that 19.4% of this total Sri Lankan population have opted to reside in the urban areas. This has been widely due to the easy access to quality education, need for a quality lifestyle, possibility of being recruited for better paying job opportunities and many other demographical and economical reasons.

With the movement of persons dispersed across the island into urban areas, a scarcity of accommodation facilities has arisen. This is because, it is naturally impossible for a limited urban area, which is holding only a very restricted piece of land, to provide bearing for commercial buildings, residential constructions, infrastructural erections and also shelter for the new entrants from the rural wilderness.

Hence, the demand for “Vertical Growth” over “Horizontal Growth” has been created.

A. Area of Scope

The scope of the research is not on identifying the loopholes of the entire law on Condominium Properties.

Instead, the researcher wishes to focus very specifically on the procedural handicaps in the law related to the registration process of the Condominium Properties.

The analysis made the researcher to understand that, most Condominium Property Dwellers are with the perception that they are with the complete control and ownership of the Condominium Property unit that they

live in. However, from a legal aspect, when a deed is made into the real estate ownership the dweller has, it was realized that they, rather have a possessory control over the Condominium Property unit and not a real ownership.

Having established that most Condominium Property Dwellers are mere possessors and are not owners of the Condominium Property units they live in, they now come to face many other difficulties in various other aspects which is expected to be addressed in detail in the discussion to come.

It has to be noted that, the researcher under no circumstance holds the view that Condominium Property concept must be eliminated from the theory of real estate. As it would be seen irrational and unacceptable when taken hand in hand with the high urbanizing trend that is developed in Sri Lanka just as in Singapore.

Instead, developing a more stringent Condominium Property registration system, is suitably commended.

B. Loop in the Procedural Law Related to the Registration Process of the Condominium Properties

The law requires the developer to register a subdivided building at least twice to bring it into the ambit of the law — firstly, to enable pre-sales of units, registration as a Provisional Condominium Property; secondly, upon completion of construction and issuance of the Certificate of Conformity, registration of the subdivided building as a completed Condominium Property (Edirimane, A., What Ails the Condominium Industry in Sri Lanka?).

Therefore, it can be seen that a Condominium Property comes into existence with the registration of the Deed of Declaration along with the Condominium Plan describing the individual Condominium units and the common elements of the building duly which are executed under the hand of the owner/s of the land in the presence of a Notary (Edirimane, A., Condominium Properties in Sri Lanka – Issues of Concern for Buyers and Sellers).

The Deed of Declaration embodies a principle document which explains the plan of subdivision which is also referred to as a ‘Condominium Plan’ in respect of a completed building, a ‘Semi Condominium Plan’ in respect of a partially constructed building and a ‘Provisional Condominium Plan’, in the case of a building which is yet to be constructed (Edirimane, A., Condominium Properties in Sri Lanka – Issues of Concern for Buyers and Sellers).

It is only then that the Condominium Property would be considered a separate immovable Property from the land

to which it is attached. This in other terms is known as the “subject matter of sale” in a sale of immovable Property agreement.

Hence, it could be derived that, if there is no “subject matter of sale”, there would not be a legally binding transfer of title to the Condominium Property buyer even at the expense of making the payment of the full consideration.

Thus, title cannot pass to a buyer of a Condominium unit unless and until the subdivided building has been registered in terms of the Apartment Ownership Act No. 39 of 2003 giving recognition to Condominium units reflected in the plan of subdivision as individual immovable Property (Edirimane, A., Condominium Properties in Sri Lanka – Issues of Concern for Buyers and Sellers).

However, as identified above, the developer has to register the subdivided building at least twice as a Provisional Condominium Property and as a completed Condominium Property in order to bring it within the legal framework. As a result, the registration procedure is taken as to be burdensome and expensive due to the requirement of the dual registration system when in actual terms a single registration would have been suffice.

Therefore, it is natural to expect from majority of Developers to avoid themselves from registering the Provisional Condominium Property. As a result of which, it could be seen that most pre-sales of units take place with no specific reference to a registered plan, allowing such sales to take place without a legally recognized subject matter (Edirimane, A., What Ails the Condominium Industry in Sri Lanka?).

Hence, it is vital to make the Condominium Property Dwellers more aware about the difference between ownership and mere possession. If not, due to the inherent weaknesses in the registration system of Condominium Properties, the innocent Dwellers, despite of having paid their valuable consideration, would have to face numerous complexities as identified below.

1) *Conditional Sale:*

It can be very clearly seen that, due to circumstances described above, an incomplete or no registration of Condominium Properties take place. Hence, there would not be a “subject matter of sale”. In the absence of such a subject matter, which is an essential requirement for a sale, the transaction between the dweller and the developer of the Condominium Property would be void in ab initio.

This is because then, there is no real transfer of title in exchange to the advance payment or full consideration paid by the dweller. Hence, instead of owning the ownership title the dweller would merely hold the title of possessor.

2) *Insurance:*

Suppose the Condominium Property collapses due to an earthquake, under usual circumstances the Condominium Property would be compensated for the loss or damage caused on to the Condominium unit owned.

In contrast, if the Condominium unit is merely possessed and not owned by the dweller, the resulting effect would be different. This is because the insurance proceeds would be released to the owner of the land and not to the possessor of the unregistered Condominium unit.

3) *Condominium Management Corporation :*

Generally, as statutorily required, every Condominium Property should consist of a Condominium Management Corporation. This needs to be registered at the Condominium Management Authority. Hence, a Condominium Management Corporation comes into existence with the registration of the Condominium Property.

The Condominium Management Corporation is a collection of the owners of the units of the Condominium Property and is in charge of the maintenance of the Condominium Property and represents the Condominium Property at various occasions.

Therefore, if the Condominium Property is not registered, the prospective buyers of its units will not be a part of a Condominium Management Corporation. This in turn, neither privileges the prospective buyers over the undivided portion of the common elements due to the lack of a valid title to a Condominium unit nor would they be benefitted by monthly maintenance of the building being carried out, as no management fees would be collected due to the absence of a Condominium Management Corporation (Edirimane, A., Condominium Properties in Sri Lanka – Issues of Concern for Buyers and Sellers).

4) *“Prospective Dwellers”:*

Moreover, it could be seen that the prospective Dwellers are mere Dwellers or possessors and not real owners. They gain title, neither over the building nor over the Condominium unit.

This is because the building has not been recognized as a separate subject matter from the land to which it is attached due to the lack of registration of the Condominium Property.

Therefore, if the developer fails to complete the construction of the structure or fails to provide the agreed facilities, the dweller would not be able to voice out to recover the financial damage the dweller faces with.

5) *Condominium Property Developer or rather the Condominium Property Dictator:*

It has to be noted that, if the Condominium Property is not registered as a separate Property from that of the land on which it is built, in realistic terms, the Property is not actually owned by those who pay valuable considerations for the development of it. Rather, it is owned by the land owner upon which it is built.

If the land owner and the developer are the same bodies, then, the developer could easily exert his unfettered discretion on the premises.

For instance, it was discovered that certain Developers dictate the parking spaces, gymnasiums, swimming pools, elevators and the restaurants which are in fact, common elements which are jointly owned by the owners of the units on a share value basis in other properly registered Condominium Properties.

Moreover, the researcher came across many Condominium Properties in Wellawatta (names withheld), where the Developers run their own businesses in the main entrance and common elements. At times, such businesses have been disruptive to the daily lifestyles of the Dwellers of the Condominium Properties.

C. *Solutions; Teething the Law Governing the Registration Process of Condominium Properties*

First most suitable step that the prospective Dwellers of Condominium Properties should undertake prior to making any payment of valuable consideration is to, investigate if the building is registered as a Provisional Condominium Property under Act No. 39 of 2003.

This would address every possible complexities that the prospective owner may face in the future as analysed above. Statutorily a process of action must be created to ensure that, this is done by the prospective Dwellers.

Moreover, the prospective owner of the Condominium unit should clarify the rightful ownership of the designated land. This investigation of records of the local authority would provide solid evidence to the buyer if

whether the land has been transferred to the developer from the actual owner of the land.

This would hold back the prospective buyer from falling into a fraudulent Property ploy.

Furthermore, as researched, the prospective buyer could enter into a Reservation Agreement. This would allow the potential buyer to reserve from the agreement or rather remove oneself from being a party to the agreement, if the buyer gets to know that the developer has not registered the building as a separate Property from that of the land on which it is constructed. Thereby it allows the potential buyer to reclaim the advance payments made by the party, prior to the termination of the sale and execution of the Agreement of Sale.

Statutory provisions must be made with this regard to ensure that the agreement between the dweller and the developer of the Condominium Property is inclusive of a clause with this regard.

Moreover, the parties could enter into an Escrow Agreement. This would allow the prospective buyer to compel the developer to deposit the funds taken from the purchaser in an Escrow Account.

Statutorily requiring an Escrow account, would ensure that the funds are kept with an independent neutral third party in a secured manner. So that, in case of failure in the contract of building the Condominium unit, the prospective dweller would not lose the funds invested.

Moreover the developer could be required to give full details of the proposed Condominium project, including a copy of the registered Master Deed, copy of the sale & purchase agreement, an explanation of the Escrow arrangement, a project budget for the first year of operation of the association of Condominium owners, etc., (Edirimane, A., Condominium purchase: Be informed).

This has to be made mandatory to the developer through the statute.

During the research it was identified that, proposals have been made to form an Association of Condominium Management Corporations dispersed across the island. The aim of the body should be to work with the Housing and Common Amenities Ministry and the Condominium Management Authority.

Through which, the different Condominium Management Corporations and the prospective buyers could share experiences in Condominium management with each other, make unified representations about common

issues with Developers to Government bodies and suggest improvements to the existing legislation.

D. Conclusion

In terms of the Roman Dutch Law, which applies to immovable Property in Sri Lanka, the owner of a building is the owner of the land upon which the building is constructed. (i.e. 'building goes with the land'). This concept changed after the enactment of the Apartment Ownership Law, which for the first time recognized vertical layers of a building, registered under its provisions, as a class of Property on its own giving the right of separate ownership for such subdivisions (Edirimane, A., Condominium purchase: Be informed).

Hence, with the boom in the Condominium Properties, the Dwellers in them were able to "privatize the air space above the ground and carve it into small blocks that could be sold for profit". This could be the reason why it is an accepted notion that the Condominium industry is no more in its infant stage but has reached its maturity.

Together with the mushrooming of skyscrapers in a haphazard manner, the need for a more observant look into the procedural aspect of the registration system of the Condominium Properties has arisen.

In fact, in *Mallika Fernando vs Nagesh Fernando* (C.A. 979/79 DC Colombo 16894/L : March 26, 2001), it was held that the registration of Condominium Property in Sri Lanka is not imperative under the Apartment Ownership law.

It could be seen that due to many reasons such as, inability to finalize the construction as per the plan or not as per the requirements of the Certificate of Conformity, common elements not adequately provided and the cumbersome nature of the process of registering Provisional Condominium Properties and completed or Semi Condominium Properties has made majority of the Developers of Condominium Properties reluctant to register or delay the registration process of the Condominium Properties.

Due to this, majority of the prospective Dwellers are now facing a massive problem. This is because, they have already paid the full consideration or an advance payment, however have not received a legal title of ownership over the particular Condominium Property.

This is because the Condominium Property has not been registered as a separate Property from that of the land on which the building was constructed.

As a result of this currently the prospective Dwellers have faced various complications such as the entire transaction taking the outlook of a conditional sale and not a real transfer of title. Moreover, they have faced with the risk not being able to claim their insurance recovery in a situation of a disaster as the insurance claim would only be given to the owner of the building (i.e. the developer or the owner of the land) and not the possessor of the Condominium unit. In addition, the Dwellers would not be able to institute a Condominium Management Corporation as they would not be recognized as owners of Condominium Properties.

Hence, it could be seen that unless and otherwise the above mentioned amendments are taken into consideration and making the procedural laws on the registration of Condominium Properties more stringent, the actual owners of the Condominium unit would continue to be possessors and Condominium Property developer would rather be the Condominium Property dictator.

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